Volume 95
Issue 1 *Dickinson Law Review - Volume 95, 1990-1991*

10-1-1990

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Robert F. Blomquist

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I. Introduction

Since 1890, judges and scholars have focused on the conceptual phrase "new tort" when confronting the problem of expanding or creating novel, noncontractual civil causes of action, or when addressing the probable ramifications of changing existing tort doctrine. "New tort" describes the process of identification, classifica-

* Professor of Law, Valparaiso University School of Law. B.S. Economics, University of Pennsylvania (Wharton School), 1973; J.D., Cornell Law School, 1977.

tion, and analysis of emerging legal interests that are purportedly ripe for judicial recognition. Use of the "new tort" concept as an approach to sorting out and classifying tort liability principles is rooted in Warren and Brandeis's *Harvard Law Review* article, *The Right To Privacy*.[1] In that seminal work, the authors articulated an overarching rationale for judicial recognition of a new cause of action for tortious disruption of privacy based upon the technological advances in the latter part of the nineteenth century that enabled one person to make photographic images of another and to make use of those images for profit.[2]

This approach to judicial creativity in the field of torts had two antecedents: (1) the evolution of the action of "trespass on the case" in early English common law;[3] and, (2) the "prima facie tort" doctrine first enunciated in nineteenth century English and American case law.[4]

In 1939, Dean William Prosser incorporated the provocative phrase "new tort" into the title of an article published in the *University of Michigan Law Review*.[5] The article, *Intentional Infliction of Mental Suffering: A New Tort*, advanced the argument that prior court decisions had functionally recognized a new cause of action for intentional infliction of emotional distress and urged other courts to formally acknowledge the creation of this unique form of tort liability in future cases.[6]

From 1939 onward, courts and legal commentators increasingly employed the phrase "new tort" to signal their examination of the need and desirability of creating new tort law. While analyzing the ramifications of new tort doctrine, judicial opinions and scholarly articles explored an assortment of policy considerations favoring or disfavoring expansion of existing tort law. Without reaching agreement about the relative importance of policy considerations that should trigger changes in tort doctrine, jurists and scholars who used the phrase "new tort" engaged in a spirited and stimulating dialogue about the nature of modern tort law. This article traces the history of judicial and scholarly use of the phrase "new tort," and considers the problems and prospects that have arisen from reference to the

1. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
2. *Id.* at 195-97, 213-20.
3. *See infra* notes 8-17 and accompanying text.
4. *See infra* notes 18-31 and accompanying text.
5. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).
6. *See infra* notes 75-87 and accompanying text.

phrase as a shorthand expression of judicial creativity in the realm of tort law.

This study is organized into three principal parts. First, this article examines the common law antecedents that provide general background analysis about the origins of the "new tort" conception in American law: the centuries old writ of "trespass on the case," the development during the nineteenth century of the "prima facie" tort doctrine, and the notion, widely recognized in the late nineteenth century, that "torts without particular names"[7] were constantly being developed. Second, the article explains how, from 1940 through 1988, courts and commentators have utilized the phrase "new tort" to resolve novel tort problems. Finally, the study synthesizes, critiques, and appraises the multiplicity of policy considerations stemming from "new tort" cases by focusing on the major themes in case law and scholarship.

II. The Intellectual Origins of the "New Torts" Concept in American Law

A. Trespass on the Case: The Release Valve of Early English Common Law

During late thirteenth century England, the emergence of the action of trespass changed the common law.[8] Having achieved political hegemony and prestige in the first part of the century, the central courts began to systematize and formalize the law that they applied.[9] As a result, what had been formless, relatively flexible *quare* actions, reflecting a wide range of trespass actions for direct personal and property damage, hardened into the special writ of trespass.[10] The writ of trespass, however, did not provide redress for injuries inflicted by indirect force and covered only limited categories of injuries that derived from earlier precedents.[11]

In response to the formalism and conservatism of the Chancery and the King's court, King Edward I effected passage of the Statute of Westminster II in the year 1285.[12] In the statute, particularly chapter 24, Edward attempted to provide remedies for otherwise

7. *See infra* notes 50-74 and accompanying text.

8. Dix, *The Origins of the Action of Trespass on the Case*, 46 YALE L.J. 1142, 1149 (1937).

9. *Id.*

10. Examples of these early actions are provided in T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (5th ed. 1956).

11. Dix, *supra* note 8, at 1150.

12. *Id.* at 1146 n.18.

remediless plaintiffs.[13] Specifically, chapter 24 stated:

> And whenever henceforth, it shall happen in the Chancery that in one case a writ is found and in a like case falling under the same law and requiring a like remedy [no writ is found], then the clerks of the Chancery shall agree in making the writ, or they may adjourn the plaintiffs until the next parliament, and let them write the cases in which they cannot agree and refer them to the next parliament, and let the writ be made with the consent of the wise men of the law; *and from henceforth, let it not happen that the court any longer fail complainants seeking justice.*[14]

American and English legal scholars of the late nineteenth century and early twentieth century, including Blackstone, Holmes, Maitland, and Ames, postulated that the emergence of the action of trespass on the case was derived directly from chapter 24 of the Statute of Westminster II.[15] Although this legislative enactment was undoubtedly part of the general legal environment of the late thirteenth and early fourteenth centuries, more recent scholarship has suggested that the special action of trespass on the case gradually evolved from the old action of trespass.[16] Such writs were said to be actions "upon the case" because, although analogous to existing forms of action, they depended on recitation of unique and compelling facts. Thus, according to the more modern view, the action of trespass on the case was *judicially* crafted over several centuries as a special form of the common law action of general trespass, adapted to the particular facts of cases in which the usual form of the writ of trespass could not apply.[17]

The significance of the medieval action on the case is threefold. First, the device was judicially created and implemented. Although legislative enactments served to inform judicial decision in particular cases, Parliament's direction was not binding. Second, full development of action on the case during the fourteenth and fifteenth centuries reflected an evolution in the thinking of common law judges. Thus, while traditional forms of action were desirable, the courts were called upon to respond to changes in society that led to "indi-

13. *Id.* at 1147.

14. *Id.* (citing Statute of Westminster II, 13 EDW. I, ch. 24 (1285)).

15. *Id.* at 1142 nn.1 & 2 (citing O.W. HOLMES, THE COMMON LAW 274-75 (1881); F. MAITLAND, EQUITY AND FORMS OF ACTION 345-46 (1909); J. AMES, LECTURES ON LEGAL HISTORY 442 (1913)).

16. Dix, *supra* note 8, at 1176.

17. *Id. See also* T. PLUCKNETT, *supra* note 10, at 372-73.

rect" forms of injury. Third, no specific criteria existed to determine whether a fact pattern should give rise to a new action on the case. Considerations of custom and legislative policy received judicial attention; however, these factors were vague and elastic.

B. The Prima Facie Tort Doctrine: A Nineteenth Century Innovation

Despite the emergence of the special action of trespass on the case, English tort law maintained strict standards. A plaintiff had no remedy unless his case fit within some specific and established rule of liability regardless of whether the action involved a writ of trespass for direct injuries, or a precedent for trespass on the case for indirect injuries. During the latter part of the nineteenth century, however, the rigorous early rules began to soften, and the prima facie tort doctrine emerged.[18]

The prima facie tort doctrine drew upon civil law traditions by basing liability on principle rather than on precedent.[19] Lord Bowen's dictum in the 1889 case of *Mogul Steamship Co. v. McGregor, Go & Co.*[20] expresses the classic statement of the prima facie tort doctrine: "Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse."[21]

Justice Oliver Wendell Holmes was the chief judicial proponent of the prima facie tort doctrine in the United States. In scholarly commentary[22] and in his opinions written while serving as a justice both on the Massachusetts Supreme Judicial Court[23] and on the United States Supreme Court,[24] Holmes admired the "frank presentation of fundamental issues which the doctrine encouraged."[25] Following the lead of Justice Holmes, several states accepted the doc-

18. Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503 (1952) (citing W. PROSSER, TORTS § 22 (1941)).

19. *Id.* (citing Friedmann, *Modern Trends in the Law of Torts*, 1 MOD. L. REV. 39 (1937); Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L.J. 22 (1933); Winfield, *The Foundation of Liability in Tort*, 27 COLUM. L. REV. 1 (1927)).

20. 23 Q.B.D. 598 (1889), *aff'd* [1892] A.C. 25.

21. *Id.* at 613.

22. *See* Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894).

23. *See* Moran v. Dunphy, 177 Mass. 485, 59 N.E. 125 (1901); Plant v. Woods, 176 Mass. 492, 504, 57 N.E. 1011, 1015 (1900) (dissenting opinion); Vegelahn v. Gunter, 167 Mass. 92, 104, 44 N.E. 1077, 1079 (1896) (dissenting opinion).

24. *See* Aikens v. Wisconsin, 195 U.S. 194, 204 (1904) ("*prima facie* the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape").

25. *See* Note, *supra* note 18, at 504.

trine or were influenced by its principles in the first half of the twentieth century.[26] For example, some American jurisdictions invoked the doctrine in actions for inducement of breach of contract, in actions growing out of labor disputes, and in cases involving unfair competition.[27] One commentator, writing in 1959, defended the prima facie tort doctrine by asserting that it had

> proved useful in assisting the development of needed reforms in the law of tort, particularly in receiving and resolving the myriad of claims which have arisen from new relationships formed, and continuously reformed, in the business world. *It serves a high purpose in providing within its compass a residuary action for timely recognition of novel claims* . . . . More importantly, it suggests a mode of reasoning in accordance with "the best light" we have, whereby the competing interests, both private and public, in any case are found and considered and honestly assessed as the relevant decisional factors.[28]

The prima facie tort doctrine, however, has not evolved into a comprehensive theory of liability in the United States.[29] Section 870 of the *Restatement (Second) of Torts* states that "[o]ne who intentionally causes injury to another is subject to liability . . . if his conduct is generally culpable and not justifiable under the circumstances . . . [even if] the actor's conduct does not come within the traditional category of tort liability."[30] Nevertheless, few American

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26. *Id.*

27. *Id.* at 504-05 (footnote omitted).

28. Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 NW. U.L. REV. 563, 573-74 (1959) (emphasis provided) (footnote omitted).

29. *Id.* at 574.

30. RESTATEMENT (SECOND) OF TORTS § 870 (1979). In a comment to this section, the drafters urge application of this principle to fact patterns that do not neatly fit pre-existing categories:

> *Nature of Section.* This Section is intended to supply a generalization for tortious conduct involving harm intentionally inflicted. Generalizations have long existed for negligence liability, involving conduct producing unreasonable risk of harm to others (*see* Sections 282, 291-294), and for strict liability, involving the carrying on of an activity that is abnormally dangerous (*see* Sections 519-520). As for conduct intentionally causing harm, however, it has traditionally been assumed that the several established intentional torts developed separately and independently and not in accordance with any unifying principle. This Section purports to supply that unifying principle and to explain the basis for the development of a more recently created intentional tort. More than that, it is intended to serve as a guide for determining when liability should be imposed for harm that was intentionally inflicted, even though the conduct does not come within the requirements of one of the well-established named intentional torts.
>
> The principle set forth in this Section has been recognized in various forms, often incomplete in their expression. It is sometimes called an innominate form of the action of trespass on the case; and in New York particularly, it has been given the appellation of a "prima facie tort" and efforts have been made to set

courts have relied upon the suggested rule.[31]

C. Torts Without Particular Names: New Tort Scholarship and Judicial Review, 1890-1939 — From Brandeis and Warren to Prosser

"New tort" scholarship in the form of intellectual discussion of changing tort principles giving rise to the recognition of a novel doctrine[32] began in earnest in 1890 with the *Harvard Law Review*'s publication of the Warren and Brandeis article, *The Right to Privacy*.[33] While not explicitly mentioning the term "new tort," the ar-

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forth its requirements with more rigidity. This Section does not attempt to establish precise and inflexible requirements. Instead, it lays down general guidelines and uses words expressing standards that vary with the circumstances to which they are applied. It is stating a general principle rather than setting forth specific rules.

Id., comment a.

31. *But see* Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854 (Mo. Ct. App. 1986) (court held that strict liability as defined by section 870 should be adopted and applied to claims based on radioactive damage). *See also* Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975); Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L. REV. 465 (1957); Hale, *Prima Facie Torts, Combination and Non-Feasance*, 46 COLUM. L. REV. 196 (1946); Halpern, *Intentional Torts and the Restatement*, 7 BUFFALO L. REV. 7 (1951); Note, *The Prima Facie Doctrine in New York — Another Writ?*, 42 ST. JOHN'S L. REV. 530 (1968).

32. "New tort" scholarship combines an interesting mixture of practical and theoretical articles. In addition to the articles cited elsewhere in this study, see, e.g., Bopp, Bostrom, McKinney, *The 'Rights' and 'Wrongs' of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth-Related Torts*, 27 DUQ. L. REV. 461 (1989); Destro, *The Emerging 'Right' to a Good Life*, WORLD 73 (Spring 1989); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Max, *A New Tort in Alabama: Wrongful Employment Termination in Violation of Public Policy*" 12 AM. J. TRIAL ADVOC. 39 (1988); Merritt, *Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society*, 42 VAND. L. REV. 1 (1989); Oddi, *The Tort of Interference With the Right to Die: The Wrongful Living Cause of Action*, 75 GEO. L.J. 625 (1986); Schuck, *The New Ideology of Tort Law*, 92 PUB. INTEREST 93 (1988); Schwartz, *The Character of Early American Tort Law*" 36 UCLA L. REV. 641 (1989); Siliciano, *Negligent Accounting and the Limits of Instrumental Tort Reform*, 86 MICH. L. REV. 1929 (1988); Young, *Reconceptualizing Accountability in the Early Nineteenth Century: How the Tort of Negligence Appeared*, 21 CONN. L. REV. 197 (1989); Comment, *Ruminations on a New Tort: Angelloz v. Humble Oil & Refining Company*, 4 LA. L. REV. 309 (1942); Comment, *'Nowhere to Go and Chose to Stay': Using the Tort of False Imprisonment to Redress Involuntary Confinement of the Elderly in Nursing Homes and Hospitals*, 137 U. PA. L. REV. 903 (1989); Note, *The Use of Criminal Statutes in the Creation of New Torts*, 48 COLUM. L. REV. 457 (1948); Note, *A Proposed New Tort Cause of Action in Missouri for Breach of the Implied Covenant of Good Faith and Fair Dealing in Commercial Contracts*, 31 ST. LOUIS U.L.J. 433 (1987); Note, *Wrongful Life: Exploring the Development of a New Tort*, 21 NEW ENG. L. REV. 635 (1985-86).

33. Warren & Brandeis, *supra* note 1. In an article written several decades after the Warren and Brandeis piece, one commentator described *The Right to Privacy* analysis as advocating a "new tort." *See* Kalvern, *Privacy and Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966). *See also* later judicial descriptions of the 1890 Warren and Brandeis article as laying the foundation for development of a "new tort": McSurely v. McClellan, 753 F.2d 88, 110 (D.C. Cir. 1985); Lerman v. Flynt Distrib. Co., 745 F.2d 123, 128-29 (2d Cir. 1984); Mendonsa v. Time, Inc., 678 F. Supp. 967, 968 (D.R.I. 1988).

ticle described a common law tort right to be left alone that had not expressly been recognized by English or American courts. The article advanced several observations about judicial creativity and the evolution of tort law that were central to the subsequent development of the "new tort" conception in scholarly literature and judicial opinions over the next one hundred years. The article began with a proposition that elegantly summarized the driving force of change in the law of torts: "[T]hat the individual shall have *full protection* in person and in property is a principle as old as the common law; but it has been found necessary from time to time *to define anew the exact nature and extent of such protection.*"[34] Specifically, the authors contended that "[p]olitical, social, and economic changes entail the *recognition of new rights*, and the common law, in its eternal youth, *grows to meet the demands of society.*"[35]

Warren and Brandeis then traced the expansion of the ideas of "life," "liberty," and "property," which in turn gave rise to new remedies and new tort causes of action.[36] The authors attributed this expansion of the law to the inevitable advance of civilization.[37]

Another premise of the Warren and Brandeis article regarding the "new tort" concept in American law was the argument that judicial innovation in the realm of tort law should be motivated in part by the need to remedy negative consequences of the march of civilization. The authors advocated recognition of a specific tort cause of action to protect invasions of privacy that occurred through new inventions and business methods.[38]

The *Right to Privacy* article postulated linkages between judicial creativity and common law development in the separate areas of contract, property, and tort law. Referring to examples of judicial innovation in implying trust or contract terms, the article describes such actions as "nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand recognition of such a rule."[39] Warren and Brandeis argued that novel contract and new property[40] innovations were consistent

34. Warren & Brandeis, *supra* note 1, at 193 (emphasis provided).
35. *Id.* (emphasis provided).
36. The authors noted that "the right to life has come to mean the right to enjoy life — the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession — intangible, as well as tangible." *Id.* Warren and Brandeis also summarized specific new tort causes of action recognized in past centuries. *Id.* at 193-95.
37. *Id.* at 195.
38. Warren & Brandeis, *supra* note 1, at 198.
39. *Id.* at 210.
40. *Cf.* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

with recognition of a broad foundation[41] of tort law to protect the "right to be left alone."[42]

Finally, the Warren and Brandeis article made an important distinction that anticipated judicial pre-occupation with "new tort" cases in decades to come.[43] The article distinguished between the introduction of a new principle and merely applying an existing principle to new cases.[44] According to the authors, only the former is really "judicial legislation."[45]

Initially, courts declined to recognize a "new tort" involving privacy rights.[46] But, beginning with the Georgia Supreme Court decision in the 1905 case, *Pavesich v. New England Life Insurance Co.*,[47] state courts gradually recognized the tort.[48] By 1960, the majority of jurisdictions acknowledged some form of the right of privacy.[49]

Another significant piece of "new tort" scholarship is the 1921 article by Professor Jeremiah Smith, *Torts Without Particular Names*.[50] Smith synthesized and amplified various jurisprudential principles concerning the gradual naming of wrongs by the courts in juxtaposition with the "unclassified residuum" of wrongs.[51]

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41. Warren & Brandeis, *supra* note 1, at 210-11.

42. *Id.* at 195 (quoting COOLEY ON TORTS (2d ed.), at 29).

43. *See, e.g., infra* notes 594-602, 757-69 and accompanying text.

44. Warren & Brandeis, *supra* note 1, at 213 n.1.

45. *Id.* Warren and Brandeis quoted J. AUSTIN, THE PROVINCE OF JURISPRUDENCE 224 (1832) and his assertion:

> I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better than that part which consists of statutes enacted by the legislature.

Id. at 213 n.1.

46. *See, e.g.*, Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902) (New York Court of Appeals dismissed a suit for invasion of privacy brought by a young woman whose picture was placed on 25,000 posters advertising defendant's flour).

47. 122 Ga. 190, 50 S.E. 68 (1905).

48. *See, e.g.*, Burns v. Stevens, 236 Mich. 443, 210 N.W. 482 (1926) (posing as plaintiff's common law wife); State *ex rel.* LaFollette v. Hinkle, 131 Wash. 86, 229 P. 317 (1924) (use of name as candidate by political party); Schwartz v. Erdington, 133 La. 235, 62 So. 660 (1913) (name signed to petitions); Vanderbilt v. Mitchell, 72 N.J.E. 910, 67 A. 97 (1907) (birth certificate naming plaintiff as father).

49. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 386 (1960).

50. Smith, *Torts Without Particular Names*, 69 U. PA. L. REV. 91 (1921). Smith is, perhaps, best known for an earlier article, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 223, 303 (1911-12). That article, written in several installments, introduced the concept of "substantial factor" to causation analysis and influenced later attempts to determine proximate cause. *See* GREAT AMERICAN LAW REVIEWS 18 (R. Berring ed. 1984).

51. Smith, *supra* note 50, at 92.

The Smith article raised six points that are relevant to the emergance of the "new tort" concept. First, Smith traced the history of the classification of torts, which progressed from procedural nomenclature in the early common law to later names based on substantive taxonomies.[52] Second, Smith pointed out the inconsistencies in the way that existing torts had been named.[53] For example, under the general heading of defamation, Smith illustrated the ambiguities created by two alternative names for injuries arising from use of language: "injurious falsehood," named according to the nature of the harm done, and "malicious language," denominated by the method or manner in which the harm is done.[54] Third, Smith analyzed the ambiguities inherent in naming torts.[55] Fourth, Professor Smith contended that use of a distinct name for every possible concrete case of tort would be both impractical and useless.[56] Analogizing the naming of existing tort causes of action to the complete codification of tort law, Smith pointed out the undesirability of attempting to pinpoint an exact name and category for every conceivable tort.[57] Fifth, Professor Smith discussed the newly recognized tort of "violation of, or interference with, the right of privacy,"[58] stemming from the Warren and Brandeis article, published over three decades earlier. Smith observed that "[f]rom time to time, courts will recognize the existence of new groups, made up of hitherto unnamed torts . . . and names will be invented (suggested) to describe each of these new groups."[59] Echoing Warren and Brandeis's argument for recognition of the new tort of privacy, Smith noted that new tort causes of action arise because of changes in lifestyles and business practices resulting

52. *Id.* at 92-93 (footnotes omitted).

> The various definitions proposed have met with much criticism. As might have been expected, it has been found that the various kinds of torts which have received specific names do not include all the wrongs which courts are accustomed to recognize as coming under the general head of torts. Hence the admission that, besides wrongs with particular names, there are "wrongs without names" ("innominate grievances") which are subjects of action, and for which damages are recoverable.

Id. (footnotes omitted).

53. "Some so-called specific torts are named according to the nature of the right affected or the harm done, while others are named by the same writer according to the method or manner by which the harm is done." *Id.* at 94 (footnote omitted).

54. *Id.* at 105-07.

55. *Id.* at 109. Smith mentioned "private nuisance" as an example of a tort that is "too broad, too general." *Id.* at 110.

56. Smith, *supra* note 50, at 110.

57. *Id.*

58. *Id.* at 113.

59. *Id.* at 112.

from technological advancements.[60] Smith postulated, however, that improved technology might also lessen the likelihood of judicial development of new tort doctrine for some types of conduct.[61] For example, Smith noted "the danger of certain uses of property hitherto regarded as extrahazardous . . ., so far as to remove some cases from the list of instances where the law imposes absolute liability, and instead leav[ing] the actor liable only for failure to use care."[62] The sixth important contribution of Smith's *Torts Without Particular Names* to nascent "new tort" analysis in the twentieth century was his observation that tort nomenclature often undergoes revision as the law surrounding each "new tort" develops.[63]

In 1922, one year after Smith's study, Professor Albertsworth addressed the *Recognition of New Interests in the Law of Torts* in the *California Law Review*.[64] By injecting a number of analytical observations derived from legal realist jurisprudence, Albertsworth laid important intellectual groundwork for later recognition of new tort causes of action.

The first point of synthesis was Professor Albertsworth's historical explanation of judicial recognition of new interests in tort law. Beginning with Roman law, he wrote about several stages of development in tort law. First, the Strict Law[65] provided an elaborate system of remedies. The availability of a remedy defined the extent of one's rights.[66] The next stage of development in the law, Equity and Natural Law, tried to give legal recognition to certain moral duties by applying remedies to them: The period of so-called Maturity of Law reversed the Strict Law and "recognized that corresponding to every duty there was a correlative right which would be protected by the law."[67]

A second contribution of the Albertsworth article to the emerging new tort concept evolved from reflections on the writings of the sociological school of jurists.[68] Albertsworth first provided back-

60. *Id.*

61. Smith, *supra* note 50, at 112.

62. *Id.* at 113-14.

63. *Id.* at 114 (footnote omitted). By way of example of this revision in nomenclature, Smith noted that the tort "slander of title" had gradually evolved to become "disparagement of title." *Id.*

64. Albertsworth, *Recognition of New Interests in the Law of Torts*, 10 CALIF. L. REV. 461 (1922).

65. Strict law succeeded the former stage of primitive law. *Id.* at 462.

66. *Id.*

67. *Id.* at 462 (footnotes omitted).

68. Sociological jurisprudence is "[t]he general name for those approaches to the study of law, in general, which have more regard to the working of law in society than to its form or content." D. WALKER, THE OXFORD COMPANION TO LAW 1153 (1980). Indeed, "[s]ociological

ground theory on the meaning of this school of legal thought and then applied these observations to the field of torts. He noted the influence of the scholars of the 1920s, such as Rudolf Jhering and Roscoe Pound, in bringing inductive processes into the administration of justice.[69]

To Albertsworth, the problem with this approach was deciding what interests, both individual and social, the law should recognize.[70] According to Albertsworth, the traditional "natural rights" concept "*must not be thought of as static, not subject to change with new and different conditions.*"[71]

Professor Albertsworth analyzed four specific new tort categories in which he believed the law was gradually giving more effect to interests not previously recognized.[72] Albertsworth argued that:

> Some courts [in the first two decades of the twentieth century] are recognizing that the injury is the primary and paramount consideration, not the character of the defendant who inflicts it, nor the nature of the act itself. If causation and injury can be established, and the defendant acted wrongfully, the law will give a remedy. Such is the case, particularly in permitting recovery for *pre-natal* injuries; *giving the wife tort actions against the husband; allowing recovery for mental suffering*; and permitting *tort actions against municipal corporations* in the face of ancient doctrines which exempted them from liability.[73]

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jurists look on legal institutions, doctrines, and precepts functionally; the form of legal precepts is the means only. They have very divergent philosophical views." *Id.*

Montesquieu is generally considered the forerunner of this school, and initial steps were taken by Jhering. In the U.S., the forerunner was Mr. Justice Holmes, succeeded by Mr. Justice Cardozo and, among academics, Roscoe Pound, followed in Australia by Stone and Paton.

A divergent branch of sociological jurisprudence is realism, the approach of jurists principally in the U.S. who regard what the courts will, in fact, do in particular cases as being the law. Notable figures adopting this standpoint have been Gray, Mr. Justice Holmes, Frank, and Llewellyn. *Id.*

69. Albertsworth observed:

> Logically, the process of making the law effective as a means of realizing justice requires a reversal of the historical method of remedy, duty, right, and interest. [In the 1920s], thanks to the insistence of Rudolf Jhering and the sociological school of jurists [including Roscoe Pound], the legal system approaches the problem of the administration of justice by an inductive, instead of a deductive, process.

Albertsworth, *supra* note 64, at 462-63.

70. *Id.*

71. *Id.* (emphasis provided) (footnote omitted). "On the contrary, they are subject to fluctuations, due to changed environmental conditions and to more adequate and effective means of enforcement by the judicial machinery." *Id.*

72. *Id.* at 463.

73. *Id.*

Albertsworth urged that this approach be utilized in future tort adjudication. Although he recognized the need for caution in judicial innovations, Albertsworth concluded his 1922 article by asserting that "if the viewpoint of the court be that the law should recognize a continually widening circle of interests, the law will, better than in the past, serve as a means to an end and to the furtherance of civilization."[74]

Drawing upon tort cases and a body of tort scholarship developed during the past decades, Dean William Prosser wrote a watershed article, *Intentional Infliction of Mental Suffering: A New Tort*, published in 1939.[75] He acknowledged at the outset the truth of Jeremiah Smith's contention that there was no necessity in law for separate named torts. Nevertheless, Prosser boldly asserted that it was time to recognize that the courts had created a "new tort."[76] Echoing Professor Albertsworth's analysis of seventeen years earlier,[77] Prosser argued that, outside of assault cases, the law has been reluctant to accept "the interest in peace of mind as entitled to independent legal protection."[78] Yet, Prosser predicted that the law was in the process of growth, and that the future of intentional infliction of mental suffering as a "new tort" was subject to change.[79]

Prosser's 1939 article did not explicitly explain what he meant by reference to "new tort." By implication, Prosser viewed a "new tort" as a recently recognized or nascent independent tort. The best evidence of this view is in Prosser's discussion of the judiciary's past allowance of mental damages when an independent tort could be identified.[80] Prosser asserted that intentional infliction of mental in-

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74. *Id.* at 491.
75. Prosser, *supra* note 5.
76. *Id.* at 1 (citing Smith, *supra* note 50).
77. *See supra* notes 64-74 and accompanying text.
78. Prosser, *supra* note 5, at 874 (footnote omitted).
79. *Id.* (footnote omitted).
80. *Id.* at 880. Prosser observed that:

> [I]f some independent tort could be made out, no matter how technical it might be, there was a cause of action; and with this cause of action as a peg upon which to hang the mental damages, recovery was freely permitted. Virtually from the beginning mental suffering has been a recognized element of damages in assault, battery, false imprisonment, malicious prosecution, and seduction . . . . As long ago as 1906, Street remarked upon this phenomenon. He called such damages "parasitic," and ventured a prediction that has proved to be prophetic:
>
> > The treatment of any element of damages as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, tomorrow *be recognized as an independent basis of liability.*
>
> *Id.* (footnote omitted) (emphasis provided) (quoting I. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 470 (1906)).

jury is "*in process of becoming a cause of action in itself.*"[81] He observed, however, that the traditional judicial tendency to allow relief by fitting the case into some existing cause of action strained the analysis, thereby disguising the real basis of recovery under some other name.[82] In Prosser's view, the courts were using "technical" categorizations[83] to protect "real" interests. Therefore, according to Prosser's analysis, recognition of a "new tort" was preferable to the use of a technical old tort or existing contract or property conceptions.

Dean Prosser's treatise, *The Law of Torts*,[84] elaborated on his analysis of "new torts" in his 1939 article. Prosser observed that new torts were constantly being recognized, and that the progress of the common law depended upon the many cases of first impression in which the courts "struck out boldly to create a new cause of action, where none had been recognized before."[85]

Prosser framed his "new tort" concept by reference to opposite extremes of tort theory. Sir John Salmon's view, on one extreme, envisioned tort law as "a set of pigeon-holes, each bearing a name, . . . to which the act or omission of the defendant must be fitted."[86] The opposite view was that the entire law of torts could be reduced to the broad principle that any harm inflicted upon another is a wrong, and calls for redress, unless the action can be justified.[87] Prosser seems to have intended his "new tort" concept to bridge the theoretical gap. In other words, Prosser probably thought of the phrase "new torts" as a dynamic way of describing an evolutionary process whereby courts named, and gave substance to, specific tort causes of action that were previously hidden in broad and general principles that contemplated private, noncontractual recovery for wrongful acts.

While courts and commentators were no doubt catalyzed to employ "new tort" phraseology by Prosser's use of the term in his 1939 article, the words have meant different things to different writers and have varied in different contexts. The phrase "new tort" appears to be a signal, or marker, for addressing the ramifications and implica-

81. *Id.* (emphasis provided).
82. *Id.* (footnote omitted).
83. Prosser, *supra* note 5, at 886. Examples of technical categories include: assaults, batteries, imprisonments, trespasses, implied contracts, invasions of privacy or doubtful property rights. *Id.* at 886-87.
84. W. PROSSER, THE LAW OF TORTS (1st ed. 1941).
85. *Id.* at 3 (citing Smith, *supra* note 50).
86. *Id.* (citing J. SALMOND, LAW OF TORTS § 2 (7th ed. 1928)).
87. *Id.* at 4.

tions of judicial creativity in responding to cases that seek to change existing tort doctrine. As such, the "new tort" concept has become a tool of jurisprudential analysis: "a form of law . . . seen as a complex of means and goals."[88]

During the fifty year period between the Warren and Brandeis article and the Prosser article, only a handful of judicial decisions expressly mentioned the phrase "new tort." For the most part, when the phrase was used, courts discussed the concept of a "new tort" as bearing on the effect of some prior legislative change in tort law from pre-existing common law. Thus, in the 1909 decision of *Florida East Coast Railway Co. v. Lassiter*,[89] the Florida Supreme Court considered the defendant railroad's argument that the recently enacted worker's compensation statute was an unconstitutional "new tort" or "new rule of liability of the master to his servant."[90] In the 1933 case *Jackson v. Anthony*,[91] the Massachusetts Supreme Judicial Court decided a conflict of laws question involving the choice of which state's wrongful death statutes should apply. That court referred to the "new tort" created by the Rhode Island Legislature in its wrongful death statute, which permitted liability where common law had not.[92] In the 1935 case *City of Indianapolis v. Willis*,[93] the Indiana Supreme Court narrowly construed the availability of a cause of action under Indiana's wrongful death statute, noting "that the action for wrongful death is a 'brand new tort.' It is a new and independent cause of action and can only be maintained when a decedent left a widow or next of kin surviving him."[94]

One of the first judicial opinions to comprehensively construe and apply the phrase "new tort" in the context of common law causes of action was the 1939 decision by the Pennsylvania Supreme Court in *Summit Hotel Co. v. National Broadcasting Co.*[95] In *Summit*, the court confronted the issue of imposing strict liability on a radio broadcasting company for an extemporaneous defamatory remark interjected by the comedian Al Jolson regarding the Summit Hotel.[96] The court focused on the unique technology of radio broadcasting, interfaced with the existing common law rule that a newspa-

88. *See* R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 71 (1982).
89. 58 Fla. 234, 50 So. 428 (1909).
90. *Id.* at 235, 50 So. at 429.
91. 282 Mass. 540, 185 N.E. 389 (1933).
92. *Id.* at 544, 185 N.E. at 391.
93. 208 Ind. 607, 194 N.E. 343 (1935).
94. *Id.* at 611, 194 N.E. at 346.
95. 336 Pa. 182, 8 A.2d 302 (1939).
96. Jolsen stated that the Summit Hotel was "a rotten hotel." *Id.* at 183, 8 A.2d at 303.

per publisher is absolutely liable for defamation. The court observed that "[t]he real difficulty arises from attempting to adapt to the new tort of radio defamation, rules of liability applicable to other fields of kindred, but not identical, types of wrong."[97] After noting the state of development and experimentation in the relatively new broadcasting industry, the Pennsylvania Supreme Court concluded that tort law was flexible enough to provide for the recognition of a "distinct form of action."[98] Underlying this conclusion was the presupposition that the law is flexible enough to recognize liability for new wrongs as progress presents changing demands on the legal system.[99] The court therefore rejected an absolute liability approach. The justices relied on "government regulation [to] afford . . . a potential check," coupled with a negligence approach when the radio station management failed to exercise due care to avoid the utterance of defamatory material.[100]

III. Opening the Floodgates: Modern Proliferation of "New Tort" Contexts

A. Judicial Creativity Explored, 1940-1969

During the thirty year period commencing in 1940, courts increasingly referred to the "new tort" phrase in the process of grappling with novel factual and legal problems in tort law. Decisions during this period fall roughly within two categories: (1) statutory construction cases, and (2) novel questions of common law causes of action.

1. Statutory Construction Cases.—Numerous cases using the phrase "new tort" focused on whether a particular statute gave rise to a private civil action that exceeded the bounds of pre-existing common law torts.[101] Those courts addressing statutory construction

97. *Id.* at 191, 8 A.2d at 309.
98. *Id.* at 198, 8 A.2d at 310.
99. *Id.* at 201, 8 A.2d at 310.
100. Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 202, 8 A.2d 302, 311 (1939).
101. Examples of this type of case include: Pennsylvania Council For Ins. On Lives v. City of Phila., 351 Pa. 214, 40 A.2d 461 (1945) (Pennsylvania Supreme Court held that a state statute authorizing the Public Service Commission to ascertain compensation for property damages stemming from abolition of railroad grade crossings "[did] not create liability for a new tort", *Id.* at 219, 20 A.2d at 463); Hardyman v. Collins, 80 F. Supp. 501 (S.D. Calif. 1948) (a federal court construed a United States civil rights statute as not triggering liability against private parties in the absence of state action because courts should "hesitat[e] to create a new tort liability . . . in the absence of direct congressional authorization, *Id.* at 507); Vater v. County of Glenn, 309 P.2d 844 (Cal. App. 1957), *vacated*, 49 Cal. 2d 815, 323

cases, however, engaged in little analysis of the reasons why a new cause of action, predicated on an act of the legislature, should or should not be recognized.[102]

A few cases, however, defy a pro forma approach. In the 1966 case of *Moungey v. Brandt*,[103] for example, United States District Judge James E. Doyle engaged in lengthy policy analysis. Judge Doyle found that a complaint based on alleged violations of a federal air safety regulation was sufficient to state a cause of action within the federal question jurisdiction of the court, but was, nevertheless, insufficient to state a cause of action for civil relief.[104] He noted that neither the federal statutes nor the administrative regulations expressly created a private damage remedy for violations of the statutes or regulations.[105] Therefore, if statutes or regulations created any damage remedy for private parties, the remedy could only be by implication.[106] While acknowledging precedent[107] and scholarly authority[108] for implication of a new tort cause of action, the court observed that traditional doctrines may require modification in a federal system because the implication of a civil remedy by a federal regulatory statute may bring to the federal courts litigation which

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P.2d 85 (1985) (California Court of Appeal rebuffed the plaintiffs' wrongful death action against a governmental irrigation district based on the contention that a statute created "new tortious liability" because, according to the court, the statute does not create liability against an irrigation district itself acting in a governmental capacity, but only as against the officers, employees, and agents of the district).

102. *Cf.* Schiffman Bros. v. Texas Co., 196 F.2d 695, 697 (7th Cir. 1952) (The Sherman Act created a new tort damage right); Banana Distrib. v. United Fruit Co., 158 F. Supp. 160, 168 (S.D.N.Y. 1957) (Sherman Act created "new tort"); Bechik Products v. Federal Silk Mills, 135 F. Supp. 570, 578 (D. Md. 1955) ("a new tort is created by Section 43(a) of the Lanham Act").

103. 250 F. Supp. 445 (W.D. Wis. 1966).

104. *Id.* at 450. The complaint alleged that:

> [T]he action arises under the Federal Aviation Act . . . 49 U.S.C. Sections 1301-end; that the defendants . . . were doing business as a business and pleasure aircraft company, using the registered airplane in question in this business; that at the time of the accident the plaintiff was a passenger for hire in said airplane; that plaintiff was injured as a direct and proximate result of the negligence of the defendants; and that this negligence consisted in . . . violations of five requirements imposed by the Civil Air Regulations of a Federal Aviation Agency.

250 F. Supp. at 448-49.

105. *Id.* at 450.

106. *Id.* at 450-51.

107. *Id.* at 451, *citing* Wheeldin v. Wheeler, 373 U.S. 647 (1963). "Increasingly the tendency in the federal courts has been to infer private rights of action from federal statutes unless to do so would defeat manifest congressional purpose." *Wheeldin*, 373 U.S. at 653, 662 (Brennan, J., dissenting).

108. Moungley v. Brandt, 250 F. Supp. 445, 451 (W.D. Wis. 1966) (citing RESTATEMENT OF TORTS §§ 286-88 (1934)); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); Note, *The Use of Criminal Statutes in the Creation of New Torts*, 48 COLUM. L. REV. 456 (1948)).

might better remain in the state courts.[109] Specifically, the court noted that many factors affect the division of judicial functions between federal and state courts. The court suggested that withholding a federal remedy is proper if no national interest compels that litigation be brought in federal district court if a state forum will accommodate the action, and if the state and federal courts have concurrent jurisdiction.[110]

Similarly, the various opinions of the Idaho Supreme Court justices in *Mead v. Freeman*[111] reflect in-depth policy and legal analysis on the question of "new tort" liability. The *Mead* court held that, in the absence of a specific dram shop statute, the common law rule that the sale of liquor to an intoxicated person is not a proximate cause of damage to a third person was not changed by state criminal legislation controlling the sale of liquor to intoxicated persons or by the state wrongful death statute.[112] Accordingly, the court held that those statutes do not give rise to a cause of action against a liquor vendor by a third party.[113]

In his partial dissent, Justice Prather argued that the Idaho Su-

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109. *Moungley*, 250 F. Supp. at 451.

110. *Id.* (citing Note, *Implying Civil Remedies From Regulatory Statutes*, 77 HARV. L. REV. 285, 292-94 (1963)). The court concluded that:

> No persuasive reason suggests itself why the efficacy of the [Federal Aviation] Program need be fortified by the creation, by implication, of a civil remedy in the federal court . . . . By 49 U.S.C. Sec. 1506, Congress expressed its intention that remedies existing "at common law or by statute" not be abridged or altered. No inadequacies in the state remedy have been called to our attention and we are aware of none.

Id.

111. 93 Idaho 389, 462 P.2d 54 (1969), *overruled by* Alegria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980).

112. *Id.* at 395, 462 P.2d at 60.

113. *Id.* The majority also rejected the plaintiff's alternative contention that the court "should, in the absence of statute, declare a change in the common law." *Id.* at 395, 462 P.2d at 60. In reaching this decision not to change the common law, the majority opinion waxed philosophical on the subjects of liquor, society, and change:

> We are aware, as the commentators tell us, that the strength of the common law lies in its capacity to adapt itself to ever changing circumstances. Although traditionally hesitant to change, it should not fail to do so when a hoary doctrine loses its *raison d'etre*. We are aware that a minority of courts have acted as requested by appellants here. We are convinced that such courts are basically unable to disenthrall themselves of the lurking suspicion that liquor in and of itself is evil. This, in spite of the fact that the legislature here, as in almost every other state, has determined as public policy that liquor is part and parcel of our social scene. Abused it may be; evils it may produce; accidents, injury and death it may cause; marriages and homes it may rupture; unemployment, insolvency and degradation may result from its overuse — but legitimate the selling and consuming of it is declared. Indeed both state and federal governments indulge in the taxation and/or wholesaling of it, from which flow great sums of money into governmental treasuries.

Id.

preme Court had no trouble in the past declaring that a violation of a statute was negligence per se, even in the absence of such a legislative declaration.[114] Justice Prather insisted that the violation of the state criminal statute should also be negligence per se "in view of the express legislative declaration that it was enacted for the safety of the people of the State of Idaho."[115]

2. Novel Questions of Common Law Causes of Action.—During the thirty year period between 1940 and 1969, the judiciary began to grapple with arguments that sought to significantly expand traditional tort causes of action. A few pioneering courts began to address novel liability theories: (a) invasion of privacy, (b) intentional infliction of emotional distress, (c) negligent infliction of emotional distress, (d) wrongful birth/wrongful life, and (e) miscellaneous new torts. In their opinions, these courts restated, synthesized, and clarified existing judicial and scholarly authority, while drawing upon current notions of policy and norms of civil behavior when authority was deficient.

(a) Invasion of privacy cases.—In the 1952 case of *Eick v. Perk Dog Food Co.*,[116] the Illinois intermediate appellate court issued a remarkable opinion recognizing a plaintiff's right of privacy from the unauthorized use of her photograph in an advertisement promoting the sale of dog food. Although *Eick* broke no new ground, it is noteworthy because the court synthesized existing authorities on the tort of privacy and restated the importance of judicial creativity in redressing new wrongs.

Four aspects of the opinion are significant. First, in passing on the question of whether Illinois would recognize a tort cause of action for invasion of privacy, the court cited judicial precedent in twenty states that "explicitly recognized the right either in direct holdings or well-considered dicta."[117] Second, the *Eick* court made reference to the large body of legal scholarship emanating from the Warren and Brandeis 1890 *Harvard Law Review* article, which supported the recognition of the privacy right.[118] Third, the court analogized its reasoning to that of several "traditional court cases where damages to reputation, physical integrity or pecuniary interests were

114. *Id.* at 403, 462 P.2d at 68 (Prather, J., dissenting in part).
115. *Id.*
116. 347 Ill. App. 293, 106 N.E.2d 742 (1952).
117. *Id.* at 295, 106 N.E.2d at 743. The court also noted that three other states had recognized the right of privacy by statutory enactment. *Id.*
118. *Id.* at 295-96, 106 N.E.2d at 743.

so slight that mental suffering [implicated in privacy cases] must have been the real basis of recovery."[119] The court relied on precedents that allowed recovery for mental suffering in assault, battery, trespass, defamation, and false imprisonment.[120] Finally, and perhaps most importantly, the *Eick* court energetically endorsed judicial creation of new causes of action, especially in compelling cases.[121] The court pointed out that the common law must remain dynamic and must not stagnate as of a certain point in time.[122] Changing times require changes in the law, and judicial failure to change the law might result in injustice.[123]

To illustrate its point, the court observed that courts in both the United States and in England have repeatedly "extended relief in new cases where there was no substantial precedent to support the action."[124] The *Eick* court cited a number of examples of this judicial innovation: imposition of third party liability on sellers of defective goods for negligent manufacturing;[125] articulation of the attractive nuisance doctrine;[126] recognition of liability for malicious interference with contractual relations;[127] enforcement of various real estate covenants in the sale of land;[128] and recognition of the contractual third party beneficiary doctrine.[129]

Fegerstrom v. Hawaiian Ocean View Estates,[130] another important case from this time period, used "new tort" terminology in discussing the emerging tort of invasion of privacy. In *Fegerstrom*, the Hawaii Supreme Court held that purchasers of land had a cause of

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119. *Id.* at 300, 106 N.E.2d at 746.

120. *Id.* 300-01, 106 N.E.2d at 746 (citations omitted). The court summarized its analogical analysis by stating:

> All in all, it is fair to say that the courts have already given extensive protection to feelings and emotions. They have shown a notable adaptability of technique in redressing the more serious invasions of this important interest of personality. No longer is it even approximately true that the law does not pretend to redress mental pain and anguish "when the unlawful act complained of causes that alone." If a consistent pattern cannot yet be clearly discerned in the cases, this but indicates that the law on this subject is in a process or growth.

Id. at 301, 106 N.E.2d at 746 (quoting Magruder, *Mental Disturbance in Torts*, 49 HARV. L. REV. 1033, 1067 (1936)).

121. Eick v. Perk Dog Food Co., 347 Ill. App. 293, 303, 106 N.E.2d 742, 747 (1952).

122. *Id.*

123. *Id.*

124. *Id.* at 304, 106 N.E.2d at 747.

125. *Id.* (citing MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916)).

126. Eick v. Perk Dog Food Co., 347 Ill. App. 293, 304, 106 N.E.2d 742, 747 (1952) (citing Sioux City & Pac. R.R. Co. v. Stout, 84 U.S. 657 (1873)).

127. *Id.* (citing Lumley v. Gye, 2 El. & Bl. 216 (Q.B. 1853)).

128. *Id.* at 304, 106 N.E.2d at 748 (citing Tulk v. Moxhay, 2 Phillips 774 (1848)).

129. *Id.*

130. 50 Haw. 374, 441 P.2d 141 (1968).

action for invasion of privacy when the defendant took pictures of their house at various stages of construction and used plaintiffs' names, along with the photograph, in sales brochures, advertisements and television commercials. In an opinion closely resembling that of the Illinois intermediate appellate court in *Eick*, the Hawaii Supreme Court relied in part on persuasive judicial and scholarly precedent that recognized a cause of action for invasion of privacy.[131] Moreover, the *Fegerstrom* court used an example of the historical evolution of tort law from the rigid common law writ system to eventual recognition of the law of fraud.[132] The Hawaii Supreme Court also pointed out its recognition of the relatively new tort of intentional infliction of emotional distress, even though that cause of action offered as little common law precedent as did the right to privacy.[133]

Finally, the *Fegerstrom* court considered and rejected a number of policy objections to recognition of a new tort of invasion of privacy in Hawaii. Specifically, the court reasoned that even if recognizing the tort would result in a proliferation of litigation, that fact was not enough to defeat recognition of the tort unless "the litigation largely will be spurious and harassing."[134] The Hawaii Supreme Court also rejected the defendant's argument that difficulty in distinguishing between public and private figures in future invasion of privacy litigation should weigh against recognizing the new tort. The court wryly noted that "[t]he difficulty in discovering the line dividing conduct satisfying that required under the reasonable man standard and conduct failing to do so has not prevented development of a cause of action for negligence."[135] The court also noted that the recognition of a right to privacy does not restrict freedom of speech or of the press.[136]

(b) Intentional infliction of emotional distress cases.—Five in-

131. *Id.* at 376, 441 P.2d at 143.

132. "Although the law of trespass was reasonably well established in the common law by the thirteenth century, no private action was available for fraud. The absence of a precedent did not prevent the common law from recognizing that tort." *Id.* n.4 (citing F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 534-35 (1899)).

133. *Id.* at 376, 441 P.2d at 143.

134. *Id.* at 377, 441 P.2d at 143. Referring to Kalvern, *supra* note 33, at 338-39, the Supreme Court of Hawaii noted that "[o]nly in the unusual case where parties actually injured are unlikely to sue and where those likely to sue are not those whose interests are of primary concern can the possibility of abuse be given substantial weight in determining whether to recognize a new cause of action." *Id.* at 377 n.5, 441 P.2d at 144 n.5.

135. Fergerstrom v. Hawaiian Ocean View Estates, 50 Haw. 374, 377 n.6, 441 P.2d 141, 144 n.6 (1968).

136. *Id.* at 377, 441 P.2d at 144.

teresting cases, decided during the 1940 to 1969 time period, applied "new tort" terminology to intentional infliction of emotional distress complaints.[137] In a 1948 case, *Bartow v. Smith*,[138] the Ohio Supreme Court turned aside a cause of action for emotional distress experienced by a pregnant woman when the defendant called her a "god-damned son of a bitch" and a "dirty crook" on a public street.[139] The case is significant for the dissenting opinion of Justice Hart, who attacked the majority's rationale that recovery was unavailable because the plaintiff's claim could not "be placed in the mold of any category of tort actions known to the law."[140] Justice Hart also catalogued other reasons for denying recovery for the physical consequences of fright, shock, or mental distress without a physical impact or injury,[141] including the lack of judicial precedent, the "evanescent and intangible" quality of mental suffering, the flood of litigation that would accompany recognition of the claim, and the administrative difficulties the judiciary would face in handling the cases.[142]

In response to these policy objections, Justice Hart observed that courts had abandoned the requirement that every tort must fit within an existing type or category of tort action.[143] Justice Hart argued that "it is the responsibility of the law to grant a remedy for a substantial wrong even though a new term must be invented to describe it."[144]

In support of his assertion, Hart referred to the writings of Sir Frederick Pollock, who had argued that the law can no longer be satisfied with "a mere enumeration of actionable injuries."[145] Moreover, Hart's dissent cited Justice Oliver Wendell Holmes's dicta on prima facie torts in *Aikens v. State of Wisconsin*,[146] and relied on the research of William Prosser on the emerging "new tort" of inten-

137. For other less noteworthy cases, see Anderson v. Knox, 297 F.2d 702 (9th Cir. 1961); Kaufman v. Western Union Tel. Co., 224 F.2d 723 (5th Cir. 1955); Pinkerton Nat'l Detective Agency, Inc. v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (1963); and Vargas v. Ruggierio, 197 Cal. App. 2d 709, 17 Cal. Rptr. 568 (1962).

138. 149 Ohio St. 301, 78 N.E.2d 735 (1948), *overruled by* Yeager v. Local Union 20, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983).

139. *Id.* at 302, 78 N.E.2d at 736.

140. *Id.* at 312, 78 N.E.2d at 740 (Hart, J., dissenting).

141. *Id.* (Hart, J., dissenting).

142. *Id.* at 312-13, 78 N.E.2d at 740.

143. Bartow v. Smith, 149 Ohio St. 301, 313, 78 N.E.2d 735, 740 (1948), *overruled by* Yeager v. Local Union 20, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983) (Hart, J., dissenting).

144. *Id.* at 313, 78 N.E.2d at 741.

145. *Id.* at 314, 78 N.E.2d at 741 (citing POLLOCK ON TORTS 16 (14th ed.)).

146. 195 U.S. 194 (1904), *cited in Bartow*, 149 Ohio St. at 315, 78 N.E.2d at 741. *See supra* notes 22-26 and accompanying text.

tional infliction of emotional distress.[147]

The 1953 decision of the Texas Supreme Court in *Harned v. E-Z Finance Co.*[148] concluded that recovery for mental suffering intentionally caused by defendant's debt collection efforts could not be allowed without proof of physical injury. The court held that any recognition of a new tort of intentional infliction of emotional distress must come from the legislature.[149] The *Harned* court found that the legislative branch would be able to weigh the public policy considerations both for and against recognition of the proposed cause of action.[150] The court asserted that considerations in favor of recognition were obvious;[151] the considerations militating against institutionalizing the new tort were similar to those outlined in the *Bartow*[152] dissent.

A 1958 opinion by the Florida Supreme Court, *Slocum v. Food Fair Stores of Florida*,[153] reflected similar judicial hesitancy to endorse a new tort of intentional infliction of emotional distress. In *Slocum*, a woman shopper contended that she experienced mental suffering, a heart attack, and aggravation of a pre-existing heart disease after receiving a comment from one of defendant's employees.[154]

In a creative approach, the *Slocum* court listed judicial and scholarly authorities who supported the recognition of a new tort.[155] The court found that allowing claims for intentional infliction of emotional distress, or insult, was preferable to "the strained reasoning so often apparent when liability for such injury is predicated upon one or another of several traditional tort theories."[156] Relying on the *Restatement of the Law of Torts*,[157] the Florida Supreme Court emphasized that the requisite showing of intent required that an act be done by the defendant "for the purpose of causing the

147. *See* W. PROSSER, *supra* note 84, at 58. "It has gradually become recognized that there is no magic inherent in the name given to a tort, or in any arbitrary classification." *See also* Prosser, *supra* note 5.

148. 151 Tex. 641, 254 S.W.2d 81 (1953).

149. *Id.* at 648, 254 S.W.2d at 87.

150. *Id.* at 648, 254 S.W.2d at 86.

151. *Id.*

152. 149 Ohio St. 301, 78 N.E.2d 735, (1948), *overruled by* Yeager v. Local Union 20, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983) (Hart, J., dissenting). These arguments against recognition of the new tort were, in large measure, derived from Prosser, *supra* note 5.

153. 100 So. 2d 396 (Fla. 1958).

154. *Id.* Specifically, the store employee told the plaintiff: "If you want to know the price, you'll have to find out the best way you can . . . you stink to me." *Id.* at 396-97.

155. *Id.* at 397.

156. *Id.*

157. *Id.* (quoting RESTATEMENT OF TORTS § 46 (1948 Supp.)).

distress or with knowledge . . . that *severe emotional distress* is substantially certain to be produced by [such] conduct."[158] Then, in juxtaposition to the narrow *Restatement* Section 46 rule, the *Slocum* court compared the broader provision of Section 48 that "granted relief for offense reasonably suffered by a patron from insult by a servant or employee of a carrier, hotel, theatre and . . . telegraph office."[159] The court went on to note that the broader liability rule recognized by the *Restatement of Torts* derived from the existence "of a special relationship, arising either from contract or from the inherent nature of a non-competitive public utility."[160]

The *Slocum* court noted the inadvisability of extending the rules of the *Restatement* to cover business invitees generally.[161] The court's final decision rested on the narrowest of grounds: "whether or not these rules are ultimately adopted in this jurisdiction, the facts of the present case cannot be brought within their reasonable intendment."[162]

Breaking new ground in its jurisdiction, the Illinois Supreme Court in *Knierim v. Izzo*[163] held that a widow stated a cause of action for intentional infliction of emotional distress in alleging that the defendant intentionally caused "great mental anguish and nervous exhaustion" by threatening and then killing her husband.[164] Citing Prosser's 1939 *Michigan Law Review* article, the court characterized the plaintiff's case as a request for judicial recognition of a "new tort."[165] The *Knierim* court referred to arguments of some courts and commentators in support of judicial reluctance to redress purely mental disturbance without an underlying traditional tort cause of action.[166] The pivotal part of *Knierim*, however, was the court's acceptance of the new cause of action. The Illinois Supreme Court agreed with the jurists and critics who argued that the justifications advanced by other courts for denying actions for intentional infliction of emotional distress had really rested upon "a predetermined conclusion dictated by history and the fear of extending liability."[167] Rooting its conclusion in the historical and policy analysis of the

158. Slocum v. Food Fair Stores of Fla., 100 So. 2d 396, 397 (Fla. 1958) (quoting RESTATEMENT OF TORTS § 46 comment (a) (emphasis provided)).
159. *Id.* at 398.
160. *Id.*
161. *Id.*
162. *Id.*
163. 22 Ill. 2d 73, 174 N.E.2d 157 (1961).
164. *Id.* at 83, 174 N.E.2d at 163.
165. *Id.*
166. *Id.* at 83-84, 174 N.E.2d at 163-64.
167. *Id.* at 87, 174 N.E.2d at 165.

1890 Warren and Brandeis *Harvard Law Review* article, the court noted that the common law had made vast progress and that remedies were no longer limited to cases of physical interference with life and property.[168]

As an important collateral issue, the *Knierim* court ruled that punitive damages could not be recovered in cases of intentional infliction of emotional distress. The court held that the remedy of compensatory damages was already "punitive" because "the outrageous quality of the defendant's conduct," which would normally justify punitive damages, forms the basis of the entire action.[169]

The Texas Supreme Court, in the 1967 case of *Fisher v. Carrousel Motor Hotel, Inc.*,[170] returned to the "new tort" schema it had first utilized in *Harned*.[171] In a decisional technique reminiscent of the Florida Supreme Court's approach in *Slocum*,[172] the Texas Supreme Court based its holding on narrow grounds and thus avoided deciding whether or not the outrage cause of action should be recognized in Texas. In *Fisher*, a defendant-employee snatched a luncheon plate from the plaintiff's hands while the employee shouted that blacks were not served in the club. Focusing on the facts, the *Fisher* court concluded that it did not have to recognize a cause of action for intentional infliction of emotional distress in order to allow the plaintiff to recover.[173] Concluding that the basis for the jury verdict was the traditional tort of battery, the Texas Supreme Court noted that actual physical injury was not required in battery cases because that action is based on an unpermitted and intentional invasion of the plaintiff's *person*, including objects held by an individual and not on any resulting physical harm.[174]

(c) Negligent infliction of emotional distress cases.—Citing "new tort" scholarship, both the California intermediate appellate court and the California Supreme Court decided in the early 1960s to allow a cause of action for negligent infliction of emotional dis-

168. Knierim v. Izzo, 22 Ill. 2d 73, 87, 174 N.E.2d 157, 165 (1961) (citing Warren & Brandeis, *supra* note 1). The court also acknowledged "the intense intellectual and emotional life which has come with the advance of civilization [making] . . . it clear that only a part of the pain, pleasure, and profit of life lies in physical things." *Id.*

169. *Id.* at 88, 174 N.E.2d at 165.

170. 424 S.W.2d 627 (Tex. 1967).

171. *Id.* at 630. *See* Harned v. E-Z Fin. Co., 151 Tex. 641, 254 S.W.2d 81 (1953). *See also supra* notes 148-52 and accompanying text.

172. Slocum v. Food Fair Stores of Florida, 100 So. 2d 396 (Fla. 1958). *See supra* notes 153-62 and accompanying text.

173. *Fisher*, 424 S.W.2d at 630.

174. *Id.* (emphasis provided).

tress for purely mental distress without a physical impact. In *Amaya v. Home Ice Fuel & Supply Co.*,[175] the plaintiff witnessed an ice truck hitting her son while she was seven months pregnant. In addition to an action against the ice company for the injuries the child received, Mrs. Amaya sued the company for her own "emotional shock and great mental disturbance" as a result of being forced to observe her infant child being injured by the negligence of the truck driver.[176]

The trial court granted defendants' motion to dismiss the emotional distress complaint for failure to state a cause of action.[177] After a detailed discussion of historical and social policies, the intermediate appellate court reversed.[178]

Granting the defendants' petition for hearing, the Supreme Court of California reinstated the dismissal order of the trial court.[179] The court conceded that California law does not require "a contemporaneous physical impact" for bystander recovery of emotional distress damages.[180] The supreme court, however, examined numerous tort cases from other jurisdictions and from California lower courts that had held defendants were not liable to third parties who were outside the range of physical peril.[181] The court was impressed by the proposition that "there are many situations involving

175. 23 Cal. Rptr. 131 (Cal. Ct. App. 1962), *vacated*, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), *overruled by* Dillon v. Legg, 68 Cal. 2d 738, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

176. 23 Cal. Rptr. at 132.

177. *Id.* at 133.

178. *Id.* at 141. Cognizant that it would be breaking new ground in California, the *Amaya* court initially examined the historical evolution of tort law. The court discussed the feudal English conception that "the actor bore responsibility for the damage he caused without regard to whether he owed a 'duty' to the injured person." *Id.* at 133. Next, the court analyzed the new economic and social circumstances of the Industrial Revolution and the new rule that emerged: "[i]n place of strict liability . . . an action for negligence would lie only if the defendant breached a duty which he owed to plaintiff." *Id.* The court then updated the duty rule, in the milieu of American jurisprudence, by discussing the "unforeseeable plaintiff" doctrine articulated in Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928). *Id.* at 134. Convinced that Ms. Amaya's emotional distress was foreseeable by the negligent defendants, the court went on to note that equitable recovery for substantial wrongs often "becomes blocked out in many cases by legalistic abstractions," including physical impact requirements, zone of impact rules, physical manifestation mandates, personal fear of safety requirements, and fear of a flood of fraudulent claims. *Id.* at 135. Noting that "at the base of these contentions there may be no more than an underlying reluctance to permit recovery in a new area of injury," the court subsequently engaged in a detailed analysis of the logic and limits of these "legalistic abstractions," rebutting the force of each barrier to recovery for negligent infliction of emotional distress. *Id.*

179. Amaya v. Home Ice Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), *overruled by* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

180. *Id.* at 299, 379 P.2d at 515, 29 Cal. Rptr. at 35.

181. *Id.* at 302-07, 379 P.2d at 517-22, 29 Cal. Rptr. at 37-40.

foreseeable risks [in which] there is no duty."[182]

The *Amaya* majority substantiated its decision to reject the claim for negligent infliction of emotional distress by weighing the administrative factors that would make it difficult for courts to sort out legitimate claims for emotional distress from fraudulent claims,[183] and by considering socio-economic and moral factors that favored encouraging technological innovation and reserving liability for negligent acts characterized by moral blame.[184] The California Supreme Court justified this wide-ranging review by observing that "[w]hen . . . a *wholly new type of liability is envisioned*, our responsibility extends far beyond the particular plaintiff before us, and touches society at large."[185]

In a lengthy dissent joined by two other jurists, Justice Peters sought to illustrate the real issue in the case as being more limited than the majority's statement of the case. According to Peters, "the real question . . . [was] whether or not a mother may recover damages for physical injuries resulting from emotional shock caused by fear for her infant child who is negligently run down by [an] . . . automobile" in her presence.[186] Justice Peters observed that "[t]he law grows, develops, expands or is limited by a case by case consideration of particular facts, and not by deciding broad general principles not involved in the case under consideration."[187]

In urging a rule imposing liability in such circumstances, the *Amaya* dissent utilized a number of arguments in favor of changing the status quo and recognizing a new form of liability. First, the dissent asserted that drawing the line between liability and nonliability, while difficult, is a primary function of appellate courts.[188] Second, Justice Peters downplayed the great weight of authority that denied negligent liability for a bystander's emotional shock when the bystander was outside of the zone of physical danger.[189] In his opinion, the bulk of precedent was "due to the sheer inertia caused by

182. *Id.* at 308, 379 P.2d at 521, 29 Cal. Rptr. at 41 (quoting Richards v. Stanley, 43 Cal. 2d 60, 66, 271 P.2d 23, 27 (1953)).

183. *Id.* at 310-13, 379 P.2d at 523-24, 29 Cal. Rptr. at 42-44.

184. Amaya v. Home Ice Fuel & Supply Co., 59 Cal. 2d 295, 313-15, 379 P.2d 513, 524-25, 29 Cal. Rptr. 33, 44-45 (1963), *overruled by* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

185. *Id.* at 313, 379 P.2d at 524, 29 Cal. Rptr. at 44 (emphasis provided).

186. *Id.* at 316, 379 P.2d at 526, 29 Cal. Rptr. at 46 (Peters, J., dissenting).

187. *Id.* at 317, 379 P.2d at 526, 29 Cal. Rptr. at 46.

188. *Id.*

189. Amaya v. Home Ice Fuel & Supply Co., 59 Cal. 2d 295, 317-18, 379 P.2d 513, 526-27, 29 Cal. Rptr. 33, 46-47 (1963), *overruled by* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

the doctrine of stare decisis, and the apparent reluctance of appellate courts to disturb the status quo."[190] Third, the *Amaya* dissent invoked two broad remedial statutory maxims derived from the *California Civil Code*, which Justice Peters viewed as supporting a new tort liability in the case at bar. The maxims provided that "for every wrong there is a remedy,"[191] and that "everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary [care] or skill in the management of his property or person."[192] Fourth, the dissent traced the historical erosion of the rule that shock is not a recoverable item of damage. This discussion followed the progression from judicial allowance of recovery for shock accompanied by physical impact, to allowance of recovery when the plaintiff was in the "zone of danger," and finally to the allowance of recovery by a member of the family even though the plaintiff was not in the "zone of danger."[193] Justice Peters concluded that "[t]hese gradual modifications of the original rule are of great [evolutionary] significance [in the] development of the law,"[194] supporting a further expansion of the rule. Finally, Peters incorporated by reference the opinion of the intermediate appellate court, which would have found liability notwithstanding the absence of the mother from the "zone of danger."[195]

(d) Wrongful birth/wrongful life cases.—A significant decision applying "new tort" language during the 1940 to 1969 time period was *Zepeda v. Zepeda*.[196] *Zepeda* involved a suit for the recovery of damages by an infant son against his father under the theory that because the son was born an illegitimate child he would suffer damages from the illegitimacy.[197] The Illinois Appellate Court, in affirming an order by the trial court dismissing the suit for failure to state a cause of action, was confronted with a novel claim lacking

190. *Id.* at 317, 379 P.2d at 526, 29 Cal. Rtpr. at 46.

191. *Id.* at 317, 379 P.2d at 527, 29 Cal. Rptr. at 47 (quoting CAL. CIV. CODE § 3523 (West 1962)).

192. Id. at 317-18, 379 P.2d at 527, 29 Cal. Rptr. at 47 (quoting CAL. CIV. CODE § 1714 (West 1962)).

193. *Id.* at 318-19, 379 P.2d at 528, 29 Cal. Rptr. at 47-48 (Peters, J., dissenting).

194. Amaya v. Home Ice Fuel & Supply Co., 59 Cal. 2d 295, 319, 379 P.2d 513, 528, 29 Cal. Rptr. 33, 48 (1963) (Peters, J., dissenting) *overruled by* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

195. *Id.* at 319-32, 379 P.2d at 528-33, 29 Cal. Rptr. at 48-56 (Peters, J., dissenting).

196. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

197. *Id.* at 245, 190 N.E.2d at 851. The son sought damages "for the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his paternal ancestors and for being stigmatized as a bastard." *Id.* at 246, 190 N.E.2d at 851.

statutory or case precedent on point in any jurisdiction.[198]

After holding that the plaintiff's constitutional and contract allegations against his father could not be entertained on appeal,[199] the court framed the sole question for review as "whether the complaint states a cause of action in tort."[200] The court recognized the evolving trend in tort law to permit actions for prenatal injuries[201] and intentional infliction of emotional distress,[202] as well as recent legislation removing the stigma of illegitimacy and legislation providing a right to adequate support.[203] Nevertheless, the court declined to recognize the new tort of "wrongful life" in Illinois. The *Zepeda* court concluded that as a matter of judicial restraint it would not create a new cause of action because the legal implications of such a tort would be too vast and the social impact would be too staggering.[204]

Faced with a similar problem in *Williams v. State*,[205] the New York State trial court reached a different result. The *Williams* court held that an infant born out of wedlock to a mentally deficient mother, who was sexually assaulted as a result of the state's negligence while confined as a patient in a state mental institution, had a cause of action against the state.[206] In reaching its conclusion, the

198. *Id.* at 246, 190 N.E.2d at 851.

199. *Id.* Plaintiff had raised allegations in the trial court under the due process and equal protection clauses of the United States Constitution amend. XIV, § 1; the due process clause of the Illinois Constitution; and under Article 11, § 19 of the state constitution, which provided that "[e]very person ought to find a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or reputation." The appellate court concluded that these constitutional questions could not be considered on appeal because the Illinois Supreme Court had denied a direct appeal in the case and transferred it for disposition to the appellate court. *Id.* at 246, 190 N.E.2d at 852. The plaintiff's contract theory, raised in his complaint, that he was a "third party beneficiary of the agreement made by his father and mother to marry each other" was rejected on appeal because "his complaint sounds in tort." *Id.* at 247, 190 N.E.2d at 852.

200. *Id.* at 247, 190 N.E.2d at 852.

201. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 248-53, 190 N.E.2d 849, 852-55 (1963), *cert. denied*, 379 U.S. 945 (1964)).

202. *Id.* at 253, 190 N.E.2d at 855.

203. *Id.* at 256-57, 190 N.E.2d at 856-57.

204. *Id.* at 259, 190 N.E.2d at 858.

205. 46 Misc. 2d 824, 260 N.Y.S.2d 953 (1965).

206. *Id.* at 834, 260 N.Y.S.2d at 963.

> The infant's cause . . . [was] predicated on the State's alleged neglectful care and supervision over the mother, Lorene Williams, while a patient . . . at [the] Manhattan State Hospital . . . . It [was] averred (par. 11) that the defendant's failure "to provide adequate, sufficient, and proper care and supervision over her while she was in the custody of the State" and "failing to protect and safeguard her health and physical body from attack and harm from others . . . resulted in the infant Christine Williams being conceived, being born and being born out of wedlock to a mentally deficient mother."
>
> Paragraph 15 of the claim . . . further pleads that said infant was . . . . deprived of property rights; deprived of a normal childhood and home life; deprived of proper parental care, support and rearing; caused to bear the stigma of

court held that novelty and lack of precedent should not be a deterrent to recognition of a new cause of action.[207] The court cited *Zepeda v. Zepeda*[208] as the "closest approach" to the case at bar,[209] but opined that "[t]angential reasoning should not be utilized as a sledge hammer or chisel to destroy a fundamental right which cries out for justice. Our courts in New York have not been swayed as easily."[210]

The judge in *Williams* acknowledged that he had read and considered several law review commentaries on the *Zepeda* case and had wrestled with the "knotty problem" posed by denying a cause of action in tort to one whose life resulted from its commission, but who was not alive when the tort was committed.[211] Nevertheless, the court took a different approach. The court observed that "the damages sustained by the mother for the assault and pregnancy are obviously distinguishable and separate from those of the infant. If only the mother can receive damages, it is not sufficient to assuage or satisfy the child."[212] The court refused to ignore the dilemma.[213]

(e) Miscellaneous cases.—In addition to the specific categories of cases previously discussed,[214] courts also utilized "new tort" ter-

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illegitimacy and has otherwise been greatly injured all to her damage in the sum of $100,000.

Id. at 825, 260 N.Y.S.2d at 954.

207. *Id.* at 826, 260 N.Y.S.2d at 955.

208. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

209. *Williams*, 46 Misc. 2d at 827, 260 N.Y.S.2d at 956.

210. Williams v. State, 46 Misc. 2d 824, 830, 260 N.Y.S.2d 953, 959 (1965). The "tangential reasoning" set forth in *Zepeda* and rejected in *Williams* focused on the domino effect that could result from recognition of a cause of action for wrongful life. *Id.* (quoting Zepeda v. Zepeda, 41 Ill. App. 2d 240, 260, 190 N.E.2d 849, 858 (1963), *cert. denied*, 379 U.S. 945 (1964)).

211. *Id.* at 831-32, 260 N.Y.S.2d at 960.

212. *Id.* at 832, 260 N.Y.S.2d at 960. The trial judge in *Williams* analogized recognition of a cause of action for wrongful birth to recognition of actions for prenatal injury resulting in physical harm to the baby. *Id.* at 829-31, 260 N.Y.S.2d at 958-60. The judge in *Williams* then quoted a 1951 New York Court of Appeals decision that had recognized a cause of action for prenatal physical injuries:

> The sum of the argument against plaintiff here is that there is no New York decision in which such a claim has been enforced. [But] . . . if that were a valid objection, the common law would now be what it was in the Plantagenet period. And we can borrow from our British friends another mot: "When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judges is to pass through them undeterred." Lord Atkin [once said that] . . . [w]e act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.

Id. at 833-34, 260 N.Y.S.2d at 962-63 (quoting Woods v. Lancet, 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951) (citations omitted)).

213. *Id.* at 834, 260 N.Y.S.2d at 963.

214. *See supra* notes 101-213 and accompanying text.

minology when disposing of a hodge-podge of additional tort theories during the period from 1940 to 1969. During these years, courts decided that allegations that interference with contractual relations "done as part of a conspiracy" did not amount to a new tort, because conspiracy itself did not create a civil cause of action.[215] Courts also recognized a counterclaim alleging fraudulent procurement of a blank paper that defendant believed would be used for a letter and not a contract;[216] held that a grandparent's conspiracy to abduct the mother's child for the benefit of the father was an actionable wrong;[217] but refused to recognize the new tort of "misappropriation of the business and product of another."[218]

B. Judicial Creativity Embraced, 1970-1979

During the seventies, courts regularly used "new tort" terminology when creating new causes of action, eroding doctrinal barriers to recovery, interpreting statutory rights, and assessing novel procedural issues. While the number of "new tort" cases exceeded the 1940 to 1969 total, the number of discrete problem areas also increased.[219] In addition, the judiciary was called upon to construe a more diverse group of statutory tort causes of action. Here, too, the number and type of "new tort" application problems expanded.

1. Statutory Construction Cases.—Three federal court decisions reviewed arguments that the Age Discrimination in Employ-

215. A.S. Rampell, Inc. v. Hyster Co., 1 Misc. 2d 788, 793, 148 N.Y.S.2d 102, 107 (N.Y. 1955).

216. Gantell v. Friedmann, 197 N.Y.S.2d 605, 608 (N.Y. 1959). The court observed that "[d]efendant's right to maintain this counterclaim does not hinge upon a label. New torts are created every day. What is important is that there must be the infliction of intentional harm, resulting in damage, without legal excuses or justification." *Id.* (citation omitted).

217. Rosefield v. Rosefield, 221 Cal. App. 2d 431, 34 Cal. Rptr. 479 (1963). The court cited a law review article, Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 488 n.62 (1962), which stated the following proposition:

> The case seems to be without precedent, but this does not mean what is obviously an invasion of a mother's legal right is not a legal wrong. The concept that there are no causes of action except those that have been recognized by precedent, assumed at some point in the common law, was not accepted generally at early common law, nor is it accepted today.

221 Cal. App. 2d at 435, 34 Cal. Rptr. at 482. *See also* 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, DEVELOPMENT OF NEW TORTS, § 5, 1173.

218. International Plastics Dev., Inc. v. Monsanto Co., 433 S.W.2d 291, 294-95 (Mo. 1968).

219. New tort categories that emerged during the 1970s included: product liability cases; abolition of immunities matters; loss of consortium disputes; wrongful discharge cases; minority shareholder actions; and insurance torts. These new categories, in addition to the "new tort" categories that emerged from 1940 to 1969 (invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, and wrongful birth/wrongful life), brought the total number of "new tort" categories to ten.

ment Act of 1967 (ADEA)[220] created a "new tort" and, thereby, conferred broad remedial power upon the courts to redress statutory violations. *Rogers v. Exxon Research & Engineering Co.*[221] was an age discrimination suit involving an employee who involuntarily retired at age sixty and contended that he did not receive promotions and salary increases because of his age. The United States Court of Appeals for the Third Circuit reversed the district court's determination that a jury could properly award damages for pain and suffering, or psychic distress. The appellate court disagreed with the lower court's expansive "new tort" interpretation of the ADEA because it believed that the statutory plan of enforcement was limited to doubling the amount of lost earnings as a maximum penalty.[222]

The district court judge in *Dorsey v. Consolidated Broadcasting Corp.*[223] followed the reasoning set forth in *Rogers*. Discerning a former radio disk jockey's ADEA claim for damages to reputation to be analogous to the pain and suffering claim that the Third Circuit had proscribed in *Rogers*, the *Dorsey* court denied the portion of the plaintiff's complaint that sought compensation for loss of reputation. In deciding the issue, the district court noted that "[a]lthough the Act provides that a court may award 'without limitation' relief, including unpaid minimum wages or other compensation, such unparticularized statutory language has not been found sufficient to expand . . . the types of relief available under the Act."[224] One year after *Dorsey* was decided, a judge on the United States District Court for the Eastern District of Wisconsin similarly ruled in *Schlicke v. Allen Bradley Co.*[225] that "[h]ad Congress intended to create a new tort resulting from discrimination on the basis of age and to provide as part of the remedy therefor recovery of damages for injury to reputation, it would have done so in terms which were not ambiguous."[226]

Two other federal courts referred to the phrase "new tort" in construing rights under various United States statutes. In *United States v. Moore*,[227] the government sought contribution from a wo-

220. 29 U.S.C. § 621-34 (1985).
221. 550 F.2d 834 (3d Cir. 1977).
222. *Id.* at 839-40. The jury had awarded the decedent's survivors $150,000 for pain and suffering as well as $30,000 in compensatory damages. The district court judge doubled the compensatory damages figure because the defendant's conduct had been "willful" under the statute. *Id.* at 836.
223. 432 F. Supp. 542 (E.D. Wis. 1977).
224. *Id.* at 543.
225. 448 F. Supp. 252 (E.D. Wis. 1978).
226. *Id.* at 253 (citation omitted).
227. 469 F.2d 788 (3d Cir. 1972).

man for the value of medical care rendered to her husband and children due to her negligence in causing an automobile accident that resulted in her family's injuries. The United States based its cause of action on the Medical Care Recovery Act.[228] The *Moore* majority found that the statute conferred an independent right of recovery on the United States, unimpaired by the ambiguous state family immunity laws that would otherwise apply.[229]

In *Amoco Oil Co. v. Environmental Protection Agency*,[230] the D.C. Circuit Court of Appeals reviewed catalytic converter emission control regulations that had been promulgated by the EPA under the Clean Air Act.[231] The issue in *Amoco* was to what extent a gasoline refiner could be held liable for the conduct of retail dealers who sell the refiner's products when the retailer's conduct violates EPA regulations.[232] The majority held that "[i]n the absence of any indication of a specific intent on the part of Congress to create a 'new tort,' the traditional common law rules of vicarious liability must apply."[233] Accordingly, the majority viewed the EPA regulation[234] as arbitrary and capricious under the Administrative Procedure Act.[235]

In an extensive dissenting opinion, Judge Skelly Wright offered a rationale for judicial recognition of what he viewed to be a new administrative law tort. Judge Wright asserted that the

> EPA's regulations are designed to deter what amounts to a "new tort" — call it negligent contamination or negligent impairment of an emission control device. It is a new form of in-

228. 42 U.S.C. §§ 2651-53 (1973) (cited in 469 F.2d at 789-90). The statute provides in pertinent part:

> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment to a person who is injured or suffers a disease . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefore, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished . . . and shall, as to this right be subrogated to any right or claim that the injured or diseased person . . . has against such third person . . . .

42 U.S.C. § 2651(a) (1973).

229. *Moore*, 469 F.2d at 790. Since the wife was domiciled in Maine, Maine's family immunity laws governed notwithstanding the fact that the accident had occurred in Pennsylvania. The district court had held that no liability exists on the part of the wife because Maine law "does not permit actions for negligent tort by one spouse against the other, or by a minor child against a parent." *Id.* at 789-90. The appellate court interpreted Maine's intrafamily immunity law less restrictively. *Id.* at 794.

230. 543 F.2d 270 (D.C. Cir. 1976).

231. 42 U.S.C. § 1857f-6c(c)(1)(B) (1970).

232. *Amoco*, 543 F.2d at 273.

233. *Id.* at 275.

234. 40 C.F.R. § 80.23(b)(2)(iv) (1975).

235. 5 U.S.C. § 706(2) (1970).

> jury which has resulted from advancing technology coupled with increasing public demand for clean air. Contrary to the majority's repeated intimations, there is no "settled law" governing responsibility for this particular narrowly-defined class of injuries. Nothing in the Constitution, the Clean Air Act, or the Administrative Procedure Act dictates that the liability rules here must conform precisely to the vicarious liability rules that continue to apply to other, more familiar, types of injuries.[236]

Several state appellate courts during the 1970s found it useful to use "new tort" language when interpreting the breadth and meaning of statutory provisions. The most important and novel interpretation is the Oregon Supreme Court's opinion in *Burnette v. Wahl*.[237] *Burnette* involved consolidated actions by five minor children, through their guardians, against their natural mothers for emotional and psychological injuries caused by the mothers' failure to perform basic parental duties. Four alternative tort theories of recovery were asserted by the plaintiffs' counsel: (1) the new tort theory of parental desertion;[238] (2) the common law tort of alienation of affections;[239] (3) intentional infliction of emotional distress;[240] and (4) the gravamen of the action: an implied cause of action for civil damages based on alleged violations of criminal and regulatory statutes that set forth a variety of procedures to ensure that children receive proper nurturing, support, and physical care.[241] The majority declined to create a "new tort" based on its "own appraisal of the policy considerations involved,"[242] noting that the state legislature had historically created new causes of action when it believed that public policy demanded them.[243] The *Burnette* court was concerned that tort actions like the one before it could interfere with the future care of children and with family relationships.[244]

In a thoughtful dissent, Justice Linde focused on the majority's flawed policy analysis, which led to what he believed was the erroneous conclusion that a new statutorily implied tort for mental and emotional injuries for breach of parental obligations did not exist.[245]

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236. Amoco Oil Co. v. Environmental Protection Agency, 543 F.2d 270, 281-82 (D.C. Cir. 1976) (Wright, J., dissenting).
237. 284 Or. 705, 588 P.2d 1105 (1978).
238. *Id.* at 708, 588 P.2d at 1107.
239. *Id.*
240. *Id.*
241. *Id.* at 709, 588 P.2d at 1108.
242. Burnette v. Wahl, 284 Or. 705, 711, 588 P.2d 1105, 1109 (1978).
243. *Id.* at 712, 588 P.2d at 1109.
244. *Id.* at 714, 588 P.2d at 1110.
245. *Id.* at 730, 588 P.2d at 1119 (Linde, J., dissenting).

Three aspects of the dissent are noteworthy. First, Linde observed that while clarification of public policy regarding the civil consequences of penal legislation would be helpful, it was unrealistic to expect the legislature to alter its past practice.[246] Second, Judge Linde disputed the majority's contention that when a court interprets a statute to imply a civil cause of action, the court has actively pronounced common law.[247] According to Linde, there is an obvious difference between a new common law theory of recovery in tort and a civil claim based on a statute. An implied statutory claim can be implied only when a statute exists to support the implication.[248] The third notable aspect of Justice Linde's dissent is his division of criminal or regulatory laws into three types:

> (1) laws that are redefinitions of common law crimes against private persons or property;[249]
>
> (2) laws that are standards of socially responsible conduct for the protection of persons endangered by the conduct;[250] and
>
> (3) laws that are governmental sanctions, penal or otherwise . . . enacted to add governmental enforcement to the recognized obligations of a relationship existing apart from the legislation.[251]

2. *Novel Questions of Common Law Causes of Action*

(a) Invasion of privacy case law.—In the early 1970s, the New York Court of Appeals decided the only case that utilized "new tort" parlance to explore issues of tortious invasion of privacy. That case, however, was of great social and historical interest.

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246. *Id.* at 726-27, 588 P.2d at 1117.
247. Burnette v. Wahl, 284 Or. 705, 727, 588 P.2d 1105, 1117 (1978).
248. *Id.* at 727, 588 P.2d at 1117.
249. *Id.* at 728, 588 P.2d at 1118.
250. *Id.*
251. *Id.* Applying the Oregon penal statutes to the instant case, Justice Linde remarked:

> It can hardly be questioned that a statute like [ORS] 163.535, which makes it a crime to desert and abandon a child intentionally, is of the third kind. It and the related sections did not enact a novel prohibition against parental neglect for the convenience of the general public or the protection of taxpayers. They enacted a legislative definition and public enforcement of certain minimal obligations of an existing relationship. Jurisprudentially it might be said the parents have a duty not to abandon and desert their young children because ORS 163.535 makes it a crime to do so, but a legislator would surely think ORS 163.535 should make it a crime to abandon and desert a child because the parent's existing duty — the duty to the child, not to the state — deserved governmental reinforcement. It is the parent's duty thus recognized under Oregon law that plaintiffs invoke in these cases.

Id.

In *Nader v. General Motors Corporation*,[252] Ralph Nader—the well-known consumer activist—sued GM for invasion of privacy, intentional infliction of emotional distress, and interference with economic advantage. The issue on appeal was limited to the legal sufficiency of the invasion of privacy claims under District of Columbia law.[253]

While the *Nader* court unanimously affirmed the lower court's denial of GM's motion to dismiss the privacy causes of action,[254] the court was concerned about the sufficiency of the allegations in Nader's complaint.[255] The court stated that "[i]n order to sustain a cause of action for invasion of privacy . . . the plaintiff must show that the appellant's conduct was truly 'intrusive' and that it was designed to illicit information which would not be available through normal inquiry or observation."[256] In justifying this approach, the majority placed heavy reliance on the fact that the court was dealing with a "new and developing area of the law."[257]

Predicting what the substantive tort law of the District of Columbia would be, the *Nader* majority indicated that Nader's allegation that GM had orchestrated intensive investigation of the plaintiff's background by asking questions of other persons and undermining Nader's character were not germane to his invasion of privacy claim. Likewise, the majority concluded that Mr. Nader's allegations that the defendant accosted him with women who made illicit proposals, and also arranged for the making of threatening and harassing phone calls, did not involve an intrusive invasion of privacy.[258]

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252. 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

253. *Id.* at 564, 255 N.E.2d at 767, 307 N.Y.S.2d at 650. The lower courts had upheld the invasion of privacy claims as opposed to GM's motion to dismiss for failure to state a cause of action. *Id.* at 571, 255 N.E.2d at 771, 307 N.Y.S.2d at 655. The pertinent choice of law policies dictated that District of Columbia privacy law govern the New York dispute because "[t]he District is the jurisdiction in which most of the acts are alleged to have occurred, and it was there, too, that the plaintiff lived and suffered the impact of those acts." *Id.* at 565, 255 N.E.2d at 767-68, 307 N.Y.S.2d at 651.

254. *Id.* at 564, 255 N.E.2d at 767, 307 N.Y.S.2d at 650.

255. *Id.*

256. *Id.* at 567, 255 N.E.2d at 769, 307 N.Y.S.2d at 653. Another classification of the common law tort of invasion of privacy is "unreasonable publicity." *Id.* at 572, 225 N.E.2d at 772, 307 N.Y.S.2d at 656 (Breitel, J., concurring).

257. Nader v. General Motors Corp., 25 N.Y.2d 560, 568, 255 N.E.2d 765, 769, 307 N.Y.S.2d 647, 653 (1970).

258. *Id.* at 569, 255 N.E.2d at 770, 307 N.Y.S.2d at 654. However, because the complaint contained allegations concerning other activities by the appellant or its agents which did satisfy the requirements for a privacy cause of action under District of Columbia law, the *Nader* majority allowed the pleading to stand. *Id.* at 571, 255 N.E.2d at 771, 307 N.Y.S.2d at 656. The majority added, however, that:

> [T]he allegations concerning the interviewing of third persons, the accosting

The concurring opinion by Judge Breitel and two other members of the court agreed with the majority's order upholding the sufficiency of the privacy causes of action, but disagreed with the majority's analysis of the particular allegations in the complaint.[259] The concurrence made a number of important jurisprudential points about tort classifications and policy implications of the developing "new tort" of invasion of privacy.

First, the concurring judges attacked the majority's linkage of several allegations in the complaint to the more restrictive tort of intentional infliction of mental distress rather than to the common-law right of privacy.[260] Second, the concurrence questioned the majority's strict and exclusive subdivision of the invasion of privacy tort into "unreasonable intrusions" and "unreasonable publicity."[261] According to Judge Brietel's analysis, although many scholars performed this analytical bifurcation, the courts should not subsequently limit the concept of a right of privacy to those narrow classifications.[262] Third, the concurring judges objected to the context of the majority's decision. Since New York had not recognized a common law right of privacy, the concurrence believed that the majority was treading in murky water by trying to apply the law of the District of Columbia.[263] Moreover, this gratuitous undertaking was further criticized by the concurrence in light of the "still inchoate . . . development" of the "new tort" of invasion of privacy in the District of Columbia.[264]

(b) Intentional infliction of emotional distress cases.—Sixteen cases utilizing "new tort" terminology in the analysis of actions for intentional infliction of emotional distress or outrage were decided by American courts during the seventies. Seven of these cases are notable.[265]

> by girls and the annoying and threatening telephone calls, though insufficient to support a cause of action for invasion of privacy, are pertinent to the plaintiff's third cause of action — in which these allegations are reiterated — charging the intentional infliction of emotional distress.

Id.

259. *Id.* at 571-76, 255 N.E.2d at 771-74, 307 N.Y.S.2d at 656-60. Judge Burke and Judge Jasen joined in Judge Breitel's concurring opinion.

260. *Id.* at 572, 255 N.E.2d at 772, 307 N.Y.S.2d at 656.

261. *Id.* at 572, 255 N.E.2d at 772, 307 N.Y.S.2d at 657.

262. Nader v. General Motors Corp., 25 N.Y.2d 560, 572, 255 N.E.2d 765, 772, 307 N.Y.S.2d 647, 657 (1970).

263. *Id.* at 573, 255 N.E.2d at 773, 307 N.Y.S.2d at 658.

264. *Id.*

265. For the less noteworthy cases, see Hamner v. Bradley, 289 Ala. 624, 270 So. 2d 81 (1972); Ford Motor Credit Co. v. Sheehan, 373 So. 2d 956 (Fla. App. 1979); Public Fin.

The Pennsylvania Supreme Court was faced with a bizarre case of first impression in *Papieves v. Lawrence*.[266] In reversing the trial court's dismissal of the case, the supreme court held that "recovery may be had for serious mental or emotional distress directly caused by the intentional and wanton acts of mishandling a [close relative's] body . . . ."[267]

At issue in *Papieves* was the disappearance of the plaintiffs' fourteen year old son. The parents later discovered that on the date of his disappearance, their son had been struck and killed by a motor vehicle operated by the defendant, who was a minor at the time of the incident. Without attempting to obtain medical assistance and without notifying either the police or the boy's parents, the defendant removed the body from the scene of the mishap, took it to his home, and hid it in his garage. Subsequently, the defendant buried the body. Over two months later, the boy's partially decomposed body was retrieved and his remains were returned to his parents.[268] The parents sued the defendant for intentional infliction of emotional distress.

The court observed that this case was unusual, but it was willing to recognize a well-developed novel claim.[269] After discussing other authorities that had recognized claims for mental suffering caused by wanton or intentional mishandling of corpses,[270] the court continued its analysis by referring to Prosser's 1939 *Michigan Law Review* article and section 46 of the *Restatement (Second) of Torts*.[271] Rejecting the defendant's argument that a physical impact was required before plaintiffs could recover, the *Papieves* court reasoned that "[i]nvocation of the impact rule is no more meaningful in this instance than it would have been in the areas of libel or invasion of privacy where recovery is permitted for mental or emotional distress without regard to the presence of 'impact'."[272] Finally, the court rejected the argument that the appropriate form of relief was a wrongful death action, holding that "it is not . . . an argument

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Corp. v. Davis, 66 Ill. 2d 85, 360 N.E.2d 765 (1976); Kaletha v. Bortz Elevator Co., 178 Ind. App. 654, 383 N.E.2d 1071 (1978); Wambsgans v. Price, 274 N.W.2d 362 (Iowa 1979); Jones v. Harris, 35 Md. App. 556, 371 A.2d 1104 (1977); Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (1972); Grimsby v. Samson, 85 Wash. 2d 52, 530 P.2d 291 (1975).

266. 437 Pa. 373, 263 A.2d 118 (1970).

267. *Id.* at 379, 263 A.2d at 121.

268. *Id.* at 375, 263 A.2d at 119.

269. *Id.* at 376-77, 263 A.2d at 120.

270. *Id.* at 377-78, 263 A.2d at 120-21.

271. Papieves v. Lawrence, 437 Pa. 373, 378, 263 A.2d 118, 121 (1970) (citing Prosser, *supra* note 5; RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

272. *Id.* at 380, 263 A.2d at 121-22.

against one cause of action to say that a second action might also have been brought."[273]

In cases decided less than a year apart, the California Court of Appeals considered the issue of whether an action for intentional infliction of emotional distress could be barred by a communication made pursuant to judicial proceedings. In *Lerette v. Dean Witter Organization, Inc.*,[274] the court answered the question in the affirmative. *Lerette* involved an action for intentional infliction of emotional distress brought by a bank president and was based on a letter sent by Dean Witter's lawyer to the bank president accusing him of intentionally misrepresenting the financial condition of a customer of Dean Witter. The letter indicated that because the customer had defaulted on a credit obligation, which had been extended in reliance on the bank president's representations of the customer's credit worthiness, Dean Witter planned to sue the president unless a settlement was reached.[275] Referring to a California statutory provision that conferred an absolute privilege on a person to make germane communications before or during a judicial proceeding,[276] the court concluded that to allow an action for outrage to proceed "would exalt a judicially derived [new tort] cause of action . . . above clear legislative intention and operate as a severe deterrent to communications otherwise protected."[277]

In *Kinnamon v. Staitman & Snyder*,[278] the California Court of Appeals distinguished *Lerette*, holding that a complaint stated a cause of action for intentional infliction of emotional distress, and that communications antecedent to judicial proceedings did not insulate defendant's attorneys from liability in that case. The court concluded that actions of attorneys in threatening criminal prosecution to obtain an advantage in a civil debt collection case were not privileged because the communication violated rules of professional conduct.[279] Accordingly, the court concluded that the action for outrage could proceed unimpeded.[280]

The dissent in *Kinnamon* vigorously argued against the dangers of too liberal an interpretation of the "new tort" of intentional inflic-

273. *Id.* at 380, 263 A.2d at 122.
274. 60 Cal. App. 3d 573, 131 Cal. Rptr. 592 (1976).
275. *Id.* at 575, 131 Cal. Rptr. at 594.
276. *Id.* at 579, 131 Cal. Rptr. at 595-96.
277. *Id.*
278. 66 Cal. App. 3d 893, 136 Cal. Rptr. 321 (1977).
279. *Id.* at 897, 136 Cal. Rptr. at 323-24 (citing CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 7-104 (1977)).
280. *Id.*

tion of emotional distress. In support of dismissing the complaint, the dissent argued that allowing the cause to proceed "would stretch the ever expanding circle of judicially created liability to absurd limits and tend to further clog our courts which are already heavily congested and overburdened with cases of substance."[281] In the dissent's view, the plaintiff's remedy was to file a complaint for disciplinary action against the defendant attorney.[282]

In *Harris v. Jones*,[283] the Court of Appeals of Maryland noted that as of 1977, the date of its decision, thirty-seven American jurisdictions recognized the tort of intentional infliction of emotional distress as a valid cause of action.[284] The court enumerated four elements that must combine to impose liability for intentional infliction of emotional distress:

> (1) The conduct must be intentional or reckless;
> (2) The conduct must be extreme and outrageous;
> (3) There must be a causal connection between the wrongful conduct and the emotional distress;
> (4) The emotional distress must be severe.[285]

Concerned about potential problems that might stem from recognizing this "new tort," the Maryland court concluded that adherence to the four enumerated elements would help courts distinguish the true claim from the false claim and distinguish frivolous claims from serious ones.[286]

The Vermont Supreme Court, in *Sheltra v. Smith*,[287] reversed the trial court's dismissal of plaintiff's complaint and recognized the tort of intentional infliction of emotional distress. Reiterating the customary arguments for and against the new tort, the court decided to risk proliferous litigation in order to provide relief for serious claims. Accordingly, the court allowed a complaint which alleged that the defendant-father "willfully, maliciously, and outrageously render[ed] it impossible for any personal contact or other communication to take place between the Plaintiff and her daughter,"[288] to proceed to trial.

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281. *Id.* at 904, 131 Cal. Rptr. at 328 (Hanson, J., dissenting).
282. *Id.*
283. 281 Md. 560, 380 A.2d 611 (1977).
284. *Id.* at 564, 380 A.2d at 613.
285. *Id.* at 565, 380 A.2d at 614 (citing Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974)).
286. *Id.* at 566, 380 A.2d at 614.
287. 392 A.2d 431 (Vt. 1978).
288. *Id.* at 433.

In another family dispute, *Vance v. Vance*,[289] the Maryland Court of Special Appeals gave an explanation of the law regarding the emotional distress tort first recognized by the state in *Harris v. Jones*.[290] Noting that the trial court judge might have been misled by the name "*Intentional* infliction of emotional distress," the court advised that "the tort need not be Intentional."[291] The court thus concluded that a defendant is responsible for the injury even if it is inflicted by extreme and outrageous recklessness.[292]

Another decision that discusses the tort of outrage as a "new tort" is the Oregon Supreme Court decision in *Brewer v. Erwin*.[293] *Brewer* provides important insights into the meaning and contours of judicial recognition of a new cause of action in tort. The case involved a suit for damages and injunctive relief brought by a tenant against her landlords, based on allegations of wrongful eviction. While reviewing the tenant's claim for intentional infliction of emotional distress, Justice Linde also reviewed extant precedent on the cause of action in Oregon and traced exactly what was meant by a court's decision to "recognize" a new tort.[294] The *Brewer* opinion adds three important insights to judicial use of the *Restatement (Second) of Torts* in recognizing "new torts."

First, the opinion clarifies the significance of judicial reference to the *Restatement (Second) of Torts* in the course of an opinion. Specifically, while acknowledging that past court decisions quote from the *Restatement*, the opinion instructs that selective quotation does not connote that the judiciary has actually adopted the *Restatement* as though it was a legislative enactment.[295] Second, the opinion points out the ambiguity of the *Restatement* regarding the "systematic statement of existing law and source of doctrinal innovation."[296]

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289. 41 Md. App. 130, 396 A.2d 296 (1979).

290. 281 Md. 560, 380 A.2d 611 (1977). *See supra* notes 283-86 and accompanying text.

291. *Vance*, 41 Md. App. at 139, 396 A.2d at 302 (original emphasis; citations omitted).

292. *Id.*

293. 287 Or. 435, 600 P.2d 398 (1979).

294. *Id.* at 455-58, 600 P.2d at 410-12.

295. *Id.* at 455 n.12, 600 P.2d at 410 n.12. With insightful analysis, Justice Linde provided additional commentary on this point:

> In the nature of common law, such quotations in opinions are no more than shorthand expressions of the court's view that the analysis summarized in the Restatement corresponds to Oregon law applicable to the facts of the case before the court. They do not enact the exact phrasing of the Restatement rule, complete with comments, illustrations, and caveats. Such quotations should not be relied on in briefs as if they committed this court or lower courts to track every detail of the Restatement analysis in other cases.

Id.

296. *Id.*

The *Brewer* court analogized section 46 of the *Restatement* to the bold normative provisions incorporated into the strict product liability provisions of section 402(a).[297] Third, the opinion criticized the *Restatement* definition of the still emerging tort of outrage. The *Brewer* court recorded its "dissatisfaction with the battery of epithets" used in the *Restatement* comments to characterize the tort,[298] and noted its preference for a broad definition that must always be tested on a case by case basis.[299]

(c) Negligent infliction of emotional distress cases.—Four judicial opinions examined various aspects of the tort of negligent infliction of emotional distress with reference to the phrase "new tort." Three cases are of particular interest.

Two cases were decided by the Pennsylvania Supreme Court: *Niederman v. Brodsky*[300] and *Sinn v. Burd*.[301] Both cases include strong dissenting opinions that object to the majority's creation of new tort law. *Niederman* was an action by a Philadelphia pedestrian against a motorist for negligent and reckless infliction of emotional distress. The trial court dismissed the complaint for failure to state a cause of action because of lack of physical impact. On appeal, the Pennsylvania Supreme Court reversed. The court held that a plaintiff has a cause of action for negligent infliction of emotional distress when he suffers from severe heart problems caused by witnessing his child being struck by the defendant's automobile.[302]

Resting its decision on considerations of humanitarianism and notions of justice, the *Niederman* court considered and rejected three basic arguments that, in the past, would have disallowed the plaintiff's suit.[303] First, the majority rejected the notion that it would be impossible for medical science to prove the linkage between the defendant's negligent act and the plaintiff's symptoms. The court pointed to the significant advances that medical science has achieved in recent years in diagnostic techniques,[304] the logical incongruity of

297. *Id.*

298. Brewer v. Erwin, 287 Or. 435, 456 n.13, 600 P.2d 398, 411 n.13 (citing Rockhill v. Pollard, 259 Or. 54, 485 P.2d 28 (1971)).

299. *Id.* (citing Rockhill v. Pollard, 259 Or. at 60, 485 P.2d at 31).

300. 436 Pa. 401, 261 A.2d 84 (1970).

301. 486 Pa. 146, 404 A.2d 672 (1979).

302. *Niederman*, 436 Pa. at 404, 261 A.2d at 85.

303. *Id.* at 404-13, 261 A.2d at 85-90. The court was also influenced by the statistics of other jurisdictions, noting that "[a] total of thirty-one jurisdictions [as of 1970 have] considered the impact rule. Of these 22, and perhaps 23 . . . have rejected the requirement of impact." *Id.* at 404 n.1, 261 A.2d at 85 n.1.

304. *Id.* at 405-06, 261 A.2d at 86.

allowing recovery for emotional distress upon a showing of "the slightest impact,"[305] and the desirability of affording the plaintiff an opportunity to substantiate his claim.[306]

Second, the *Niederman* court reviewed the fear that the allowance of negligent infliction of emotional distress claims without the requirement of physical impact would lead to fictitious injuries and fraudulent claims. In refusing to accept this assertion, the court indicated that the opportunity for fallacious claims was as great in situations where the physical impact was slight and unrelated.[307]

Third, citing Prosser's 1939 *New Tort* article for authority, the majority rejected the proposition that allowing recovery in the absence of impact would create an unmanageable avalanche of new cases. The court indicated that if the judiciary's caseload did increase, it would be the responsibility of the state's judicial system to handle the load.[308]

In *Sinn v. Burd*,[309] the Pennsylvania Supreme Court held that recovery of damages for negligently caused mental distress is not precluded merely because the plaintiff was outside the "zone of danger."[310] Reciting its earlier decision in *Niederman*, the court noted that it had "joined the ranks of forward-looking jurisdictions" in abandoning the impact rule in cases of negligent infliction of emotional distress.[311] Using the *Niederman* case as precedent for changing tort law, the *Sinn* majority stated that "experience has taught us that the zone of danger requirement can be unnecessarily restrictive and prevent recovery in instances where there is no sound policy basis supporting such a result."[312] Moreover, the court observed that "[t]he wisdom and . . . justice of cutting off a bystander's potential recovery on a *per se* basis simply because the person was situated beyond the zone of danger has been soundly criticized."[313] After considering numerous policy arguments bearing on the advisability of creating a new rule of tort law for bystander recovery, the majority changed pre-existing law to allow recovery for instances in which emotional distress of the bystander was a reasonably foreseeable

305. *Id.* at 406-07, 261 A.2d at 86.
306. *Id.* at 408, 261 A.2d at 87 (citing Falzone v. Busch, 45 N.J. 559, 561, 214 A.2d 12, 15-16 (1965)).
307. Niederman v. Brodksy, 436 Pa. 401, 409-10, 261 A.2d 84, 88 (1970).
308. *Id.* at 412-13, 261 A.2d at 89.
309. 486 Pa. 146, 404 A.2d 672 (1979).
310. *Id.*
311. *Id.* at 153, 404 A.2d at 676.
312. *Id.* at 155, 404 A.2d at 677.
313. *Id.* at 158 n.8, 404 A.2d at 678 n.8.

injury.[314]

The impact rule was rejected in a 1973 Florida intermediate appellate court case. In *Stewart v. Gilliam*,[315] the panel, in a divided decision, held that a plaintiff who suffered a heart attack in reaction to fright caused by the noise from an automobile collision with her house could recover for negligent infliction of emotional distress, despite a lack of physical impact. The majority made two compelling arguments in support of its conclusion that Florida should join the other jurisdictions that had abandoned the impact rule. The initial argument was that the law "must keep pace with changes in our society, for the doctrine of stare decisis is not an iron mold which can never be changed."[316] The second argument discarded the notion that any change in the impact rule should come from the legislature. Observing that courts should not be remiss in their duty to overturn unsound precedent in the area of tort law, the majority indicated that it would be abdicating its own function in a peculiarly nonstatutory area if it refused to reconsider an old and unsatisfactory court rule.[317]

In contrast to the majority's bold assertions, the *Stewart* dissent saw the case in a different light. According to the dissent, the case presented the familiar problem of striking a balance between the separation of governmental powers and doing justice in specific cases.[318] Alert to the possibility of second-order consequences of judicial policymaking,[319] the dissent contended that abandonment of the impact rule in cases involving negligent infliction of emotional distress involves more than an extension of, or deviation from, judicial precedent. Abandonment of the impact rule "involves a detailed

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314. Sinn v. Burd, 486 Pa. 146, 158-63, 404 A.2d 672, 678-81 (1979).

315. 271 So. 2d 466 (Fla. Dist. Ct. App. 1973).

316. *Id.* at 471 (citing Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971)). The opinion included an extensive quote from O.W. HOLMES, THE COMMON LAW 5 (1881):

> The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappear, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and centers on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

271 So. 2d at 471.

317. 271 So. 2d at 477.

318. *Id.* at 478 (Reed, C.J., dissenting).

319. *See generally*, Blomquist, *Solar Energy Development, State Constitutional Interpretation and Mount Laurel II: Second Order Consequences of Innovative Policymaking by the New Jersey Supreme Court*, 15 RUTGERS L.J. 573 (1985).

law-making process which has the potential for far-reaching consequences."[320]

(d) Wrongful birth/wrongful life cases.—Judicial decisions that addressed claims for preconception torts proliferated during the seventies. Most courts were hesitant to expand this type of tort liability and, therefore, denied "new tort" claims.[321] Opinions by two state supreme courts—Illinois and New York—provide insight to the policy considerations involved in the judicial creation of these controversial new causes of action.

In *Renslow v. Mennonite Hospital*,[322] the Illinois Supreme Court ignored the conservative trend in this area of the law and held that an infant could sue a hospital and physician for injuries sustained as a result of the negligent transfusion of RH-negative blood into the mother who had RH-positive blood. In reaching this result, the court was not deterred by the fact that the transfusion had occurred several years before the infant was conceived. In a panoply of opinions, the state supreme court justices expressed the different policy rationales that each believed should guide the holding in the case.

In the *Renslow* plurality decision, endorsed by three justices, the court discussed numerous law review articles that had criticized the rule of law that permitted a child to bring a cause of action for prenatal injuries only in cases in which the child was viable at the time of the injury.[323] Moreover, the court acknowledged a number of

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320. Stewart v. Gilliam, 271 So. 2d 466, 478 (Fla. Dist. Ct. App. 1973). The dissent continued:

> This [creative task] is not for the courts, but the legislature. When the judiciary becomes involved in the process of law making, representative government is abandoned and so is the protection of the checks and balance system established by our state constitution. To illustrate the latter, if the legislature exceeds its police power by the adoption of unreasonable legislation, a citizen may turn to his court system for protection. Where may he go, however, for such protection in the case of equally arbitrary judge-made law?

Id.

321. *See, e.g.*, Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (court refused to create a new tort of wrongful life for a physician's failure to properly perform an abortion on plaintiff's mother); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974) (minor child, born out of wedlock, did not state cause of action against her father for the new tort of wrongful birth or wrongful life). *But see* Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496 (1979), *aff'd in part, rev'd in part*, 497 Pa. 77, 439 A.2d 110 (1981) (in case involving actions by parents against physicians on behalf of infants for "wrongful life" and in their own right for pecuniary expenses for the care of an infant born with neurofibromatosis, former claims disallowed but latter claims, absent recovery for emotional distress, allowed).

322. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

323. *Id.* at 352-60, 367 N.E.2d at 1252-56 (citing White, *The Right of Recovery for Prenatal Injuries*, 12 LA. L. REV. 383, 401 (1952); Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140, 141 n.5 (1976); Comment, *Negligence and the*

Illinois lower court decisions that recognized a surviving infant's right of action for injuries sustained in utero during the previable stage of its development.[324] In support of the appellate court's rejection of the defendants' contention that no duty was owed to the plaintiff because of the unforeseeability of her injuries,[325] the court noted that medical science understood the nuances of blood typing at the time of the plaintiff's injury so that her injuries were foreseeable.[326] In addition, the court downplayed the problems that defendants might have in defending against stale claims.[327]

Justice Dooley's concurring opinion in *Renslow* was more expansive than the plurality opinion in justifying judicial creation of a new cause of action for a wrong committed prior to a child's existence. The concurrence sought to legitimatize acts of judicial legal creativity. Justice Dooley urged that "[c]ourts must take an active part in the development of the common law, although this may mean creativeness."[328] Justice Dooley linked creativeness in the law to flexibility by urging the court to "remember that the body of law is not a repository of stagnant problems of society but a vital, moving force which deals with the current problems of society."[329]

Justice Ryan's dissent in the *Renslow* case decried the great change the court was making in traditional principles of tort law. According to Ryan, " 'liability must stop somewhere short of the freakish and the fantastic'."[330] The result in *Renslow*, he argued, signaled the demise of the primary tort liability concepts: duty and foreseeability.[331] In Ryan's view, the court's decision reflected a blind concern for loss-spreading which disregarded the competing policy of limiting the liability to which the public can be subjected and focused solely upon the needs of injured plaintiffs.[332]

In 1978, the New York Court of Appeals issued an intriguing opinion on the subject of "wrongful birth" in a consolidated action

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Unborn Child: A Time for Change, 18 S. DAK. L. REV. 204, 213-14 (1973); Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 563 (1962)).

324. 67 Ill. 2d at 352, 367 N.E.2d at 1252.

325. *Id.* at 353, 367 N.E.2d at 1253.

326. *Id.* at 354, 367 N.E.2d at 1253.

327. Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 355, 367 N.E.2d 1250, 1255 (1977).

328. *Id.* at 361, 367 N.E.2d at 1257 (Dooley, J., concurring).

329. *Id.*

330. *Id.* at 372, 367 N.E.2d at 1262 (Ryan, J., dissenting) (quoting Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 27 (1953)).

331. *Id.* at 373, 367 N.E.2d at 1262.

332. Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 374, 367 N.E.2d 1250, 1263 (1977).

involving companion cases. On the one hand, the majority of the court in *Becker v. Schwartz*[333] held that "wrongful life" complaints filed on behalf of infants did not state cognizable causes of action when the complaints were based upon medical negligence for failure to accurately inform certain patients of pregnancy risks, thereby resulting in the birth of abnormal infants.[334] On the other hand, the same allegations led the court to recognize a direct cause of action by the patients for economic damages suffered as a consequence of the births, in the form of expenses for extraordinary care and treatment of the children.[335]

Three dimensions of the majority opinion in *Becker* are significant. First, the court acknowledged the gravity of the policy considerations at issue in the case. The court stated that "the weighing of the validity of a cause of action seeking compensation for the wrongful causation of life itself casts an almost Orwellian shadow, premised as it is upon concepts of genetic predictability once foreign to the evolutionary process."[336] Second, the *Becker* majority offered an engaging taxonomical analysis of "factually divergent wrongs" subsumed beneath the broad category of "wrongful life" causes of action.[337] The court trifurcated the typical kinds of "wrongful life" cases into the following distinct categories:

> (1) "wrongful conception" cases wherein one or both parents have undergone an unsuccessful surgical birth control procedure and then seek damages for the birth of an unplanned child;[338]
>
> (2) "wrongful diagnosis" cases involving suits for damages incurred upon the birth of a child and based upon an erroneous diagnosis of an existing pregnancy, which results in the deprivation of the mother's choice to terminate the pregnancy within

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333. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

334. *Id.* at 408, 386 N.E.2d at 810, 413 N.Y.S.2d at 898.

335. *Id.* at 412-13, 386 N.E.2d at 812, 413 N.Y.S.2d at 901.

336. *Id.* at 408, 386 N.E.2d at 810, 413 N.Y.S.2d at 898. The court continued:

> It borders on the absurdly obvious to observe that resolution of this question transcends the mechanical application of legal principles. Any such resolution, whatever it may be, must invariably be colored by notions of public policy, the validity of which remains, as always, a matter upon which reasonable men may disagree.

Id.

337. *Id.* In undertaking this taxonomy, the court relied upon extensive scholarly literature. *See id.* at 409 n.4, 386 N.E.2d at 810 n.4, 413 N.Y.S.2d at 898 n.4 (citing articles).

338. Becker v. Schwartz, 46 N.Y.2d 401, 409, 386 N.E.2d 807, 810, 413 N.Y.S.2d 895, 898-99 (1978). In such cases, "damages have not been sought on behalf of the child — a healthy and normal infant — but by the parents for expenses attributable to the birth, including the pecuniary expense of rearing the child." *Id.*

the permissible time period;[339] and

(3) "wrongful birth" disputes wherein an illegitimate, but otherwise healthy child, seeks recovery in his or her own behalf for the injury suffered as a consequence of his or her birth as a stigmatized child.[340]

The *Becker* majority discerned that the claims before it encompassed yet another category of "wrongful life" cases: cases that are premised upon the birth of a fully intended but abnormal child for whom extraordinary care and treatment is required.[341] With regard to this fourth category of cases, the court observed that "[i]rrespective of the label coined, plaintiffs' complaints sound essentially in negligence or medical malpractice."[342]

Using the foregoing as a foundation, the *Becker* court distinguished between claims by the handicapped infants for "wrongful life" and the validity of the parents' actions for damages resulting as a consequence of the birth of their children.[343] As to the former set of claims, the court found that the infants did not suffer any legally cognizable injury because what they sought was beyond the competence of the judiciary.[344] But, as to the latter set of claims, the court of appeals reached a different conclusion. Utilizing traditional tort language, the court held that "but for the defendants' breach of their duty to advise plaintiffs," the parents would not have had to incur

339. *Id.* at 409, 386 N.E.2d at 811, 413 N.Y.S.2d at 899 (citations omitted).

340. *Id.*

341. *Id.*

342. *Id.* "As in any cause of action founded upon negligence, a successful plaintiff must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party." *Id.* (citations omitted).

343. Becker v. Schwartz, 46 N.Y.2d 401, 410-11, 386 N.E.2d 807, 812-13, 413 N.Y.S.2d 895, 900-01 (1978).

344. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. The court mused that:

> Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such proposition are staggering. Would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?

Id.

Moreover, the court perceived a second flaw in this kind of action: "[a] cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence." *Id.* Accordingly, the court concluded that the law is not equipped to make such a comparison. *Id.*

the extraordinary costs of raising handicapped children.[345] Moreover, in the majority's view, the calculation of damages necessary to make the parents whole requires nothing extraordinary.[346] However, for policy reasons, the court disallowed parental recovery of emotional damages in such cases.[347]

Judge Wachtler, in a partial dissent, expressed disagreement with the majority's recognition of the parents' rights to press claims for genetic defects against physicians. Wachtler argued that the majority had "created a kind of medical paternity suit":

> It is a tort without precedent, and at variance with existing precedents both old and new . . . . The limits of this new liability cannot be predicated [sic]. But if it is to be limited at all it would appear that it can only be confined by drawing arbitrary and artificial boundaries which a majority of the court consider popular or desirable. This alone should be sufficient to indicate that these cases pose a problem which can only be properly resolved by a legislative body, and not by courts of law.[348]

(e) Product liability cases.—Spurred by the American Law Institute's adoption of section 402A of the *Restatement (Second) Of Torts* a few years earlier, eight cases decided during the 1970s used "new tort" prose to categorize and explain doctrinal changes involving product liability cases.

In *Cronin v. JBE Olson Corp.*,[349] the California Supreme Court made reference to its seminal decision in *Greenman v. Yuba Power Products, Inc.*[350] and to the embodiment of the strict liability approach in section 402A of the *Restatement (Second) Torts*.[351] The *Cronin* court continued to follow an innovative approach to developing product liability law. A unanimous court held that an injured plaintiff seeking recovery on the theory of strict liability in tort need not prove, as required by the *Restatement*, that the product "defect" made the product unreasonably dangerous to the user or consumer; all that was required in California was that the plaintiff establish a defective condition of the product.[352]

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345. *Id.* at 412, 386 N.E.2d at 813, 413 N.Y.S.2d at 901.
346. *Id.*
347. *Id.*
348. Becker v. Schwartz, 46 N.Y.2d 401, 422, 386 N.E.2d 807, 819, 413 N.Y.S.2d 895, 907 (1978) (Watchler, J., dissenting in part).
349. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
350. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
351. *Cronin*, 8 Cal. 3d at 128-29, 501 P.2d at 1161, 104 Cal. Rptr. at 441.
352. *Id.* at 134-35, 501 P.2d at 1163, 104 Cal. Rptr. at 443.

In *Atkins v. American Motors Corp.*,[353] the Alabama Supreme Court adopted the language and principles of section 402A. In a preamble to the creation of strict products liability in Alabama, the court traced the erosion of privity defenses in implied warranty cases and the eventual judicial recognition of the "new tort action" of strict liability.[354]

The California Supreme Court, in *Daly v. General Motors Corp.*,[355] applied the principles of comparative negligence that it had adopted in an earlier case[356] to actions founded on strict products liability. Thus, the court held that while evidence of a plaintiff-decedent's intoxication and failure to wear a seat belt could be weighed in the balance to equitably allocate the loss among all parties legally responsible in proportion to their fault,[357] assumption of the risk was inappropriately used by the court below to bar all recovery by the plaintiff.[358] In reaching this conclusion, the majority opinion referred to the historical background of its approach and noted that "the doctrinal encumbrances of contract and warranty, and the traditional elements of negligence, were stripped from the remedy, and a new tort emerged which extended liability for defective product design and manufacture beyond negligence but short of absolute liability."[359]

Interestingly, two separate opinions in *Daly* took issue with the majority's semantical imprecision in synthesizing the "new tort" of strict products liability with comparative negligence principles. Justice Jefferson criticized the majority's inability to label the new principles it had invoked. Jefferson took issue with the majority's indecision as to whether the newly recognized doctrine should be known as comparative fault, equitable apportionment of loss, or equitable allocation of loss.[360] Jefferson believed that the majority's inability to give the new doctrine an appropriate label is some indication of the shaky ground upon which the majority decided to tread.[361]

In a similar vein, Justice Mosk criticized the majority's failure to cabin the new tort principles that it had enunciated in *Daly* into

353. 335 So. 2d 134 (Ala. 1976).
354. *Id.* at 137-44.
355. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rtpr. 380 (1978).
356. *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
357. *Daly*, 20 Cal. 3d at 745-46, 575 P.2d at 1174, 144 Cal. Rptr. at 392.
358. *Id.*
359. *Id.* at 733, 575 P.2d at 1166, 144 Cal. Rtpr. at 384.
360. *Id.* at 751, 575 P.2d at 1169, 144 Cal. Rptr. at 387 (Jefferson, J., concurring in part and dissenting in part).
361. *Id.*

less permeable categories:

> The conclusion is inescapable that the majority, in avoiding approval of comparative negligence in name as a defense to products liability, are thereby originating a new defense that can only be described as comparative products liability. We may now anticipate similar defenses in the vast number of other tort actions. Can comparative libel, comparative slander of title, comparative wrongful litigation, comparative nuisance, comparative fraud, be far behind?[362]

(f) Abolition of immunity cases.—In a variety of cases reported during the seventies, courts embraced various modes of judicial creativity to expand tort liability by rendering decisions that abolished or eroded traditional doctrines of sovereign immunity and intrafamily immunity.

In some sovereign immunity cases, courts interpreted relatively new tort claims statutes, enacted following World War II, to give rise to expanded liability against government defendants.[363] In other, more momentous cases, courts wrote opinions that judicially abrogated the sovereign immunity doctrine. The Pennsylvania Supreme Court's decision in *Ayala v. Philadelphia Board of Public Education*[364] is a good example. In *Ayala*, a student lost an arm while operating machinery in a shop class. In his subsequent suit, the student alleged that the school district employees were negligent in failing to supervise the class, in supplying the machine for use without a proper safety device, and in failing to warn students of the dangerous condition of the machine. The trial court dismissed the action, based on the doctrine of governmental immunity. The supreme court reversed the lower court holding, stating that it was joining the increasing number of jurisdictions that have judicially abandoned the sovereign immunity doctrine—a doctrine that the court characterized as "long since devoid of a valid justification."[365] The court re-

362. Daly v. General Motors Corp., 20 Cal. 3d 725, 761, 575 P.2d 1162, 1184, 144 Cal. Rptr. 380, 402 (1978) (Mosk, J., dissenting). "By whatever name, negligence, heretofore just one subtopic in the elaborate spectrum of torts which require six volumes and appendices of the *Restatement (Second) of Torts* to cover now seems destined to envelope the entire tort field." *Id. See also* Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 448 146 Cal. Rptr. 550 (1978) (Mosk, J., dissenting).

363. *See* Silverlight v. Huggins, 347 F. Supp. 895, 896 (D.V.I 1972), *rev'd in part*, 488 F.2d 107 (3d Cir. 1973); Baldwin v. State, 6 Cal. 3d 424, 491 P.2d 1121, 99 Cal. Rptr. 145 (1972); Board of Comm'rs of Delaware County v. Briggs, 167 Ind. App. 96, 337 N.E.2d 852 (1975). *Cf.* Palmer v. State, 173 Ind. App. 208, 363 N.E.2d 1245 (1977).

364. 453 Pa. 584, 305 A.2d 877 (1973).

365. *Id.* at 587, 305 A.2d at 878.

ferred to the traditional notion encompassing sovereign immunity—that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience"[366]—as an anachronistic social philosophy in modern America.[367] The court, citing Prosser's *New Tort* article, expressly rejected fear of excessive litigation as a justification for the immunity doctrine.[368] On similar grounds, the justices found unpersuasive the policy arguments that governmental functions would be impeded as a result of liability for tortious conduct.[369] In closing, the *Ayala* court rejected the argument that it should defer to legislative action, noting that immunity rules were created by the judiciary and "*what* [the judiciary] *put together, it can dismantle.*"[370]

Numerous courts during the seventies made reference to the words "new tort" in cases involving previous abrogation of immunity and asserted the proposition that mere removal of a previous procedural bar to suit should not be construed to create new causes of action. Thus, in *Holodook v. Spencer*,[371] the New York intermediate appellate court held that a prior New York case that had abolished the defense of intrafamily tort immunity for nonwillful torts did not create new torts.[372] Similarly, the federal district court in *In Re Bomb Disaster*[373] held that by enacting the Federal Tort Claims Act, Congress did not intend to waive governmental immunity to tort claims based on a theory of strict liability, thereby exposing the public treasury to every new tort theory.[374] In a related federal case in-

366. *Id.* at 593, 305 A.2d at 881 (quoting Russell v. Men of Devon, 2 T.R. 667, 673, 100 Eng. Rep. 359, 362 (1788)).

367. The court supported this contention by quoting from a scholarly article, Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41, 48 (1949): "There is widespread acceptance of a philosophy that those who enjoy the fruits of the enterprise must also accept its risks and attendant responsibilities." *Id.* at 594, 305 A.2d at 882 (original emphasis omitted).

368. *Id.* at 595, 305 A.2d at 882 (citing Prosser, *supra* note 5, at 874).

369. Ayala v. Philadelphia Bd. of Public Educ., 453 Pa. 584, 595-96, 305 A.2d 877, 882-83 (1973).

370. *Id.* at 600, 305 A.2d at 885 (quoting Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 503, 208 A.2d 193, 202 (1965) (emphasis in original)). The court addressed arguments in favor of stare decisis and then went on to note the distinction between precedent and policy: "Precedent speaks for the past; policy for the present and the future. The goal which [a court should] seek is a blend which takes into account in due proportion the wisdom of the past and the needs of the present." *Id.* at 603-04, 305 A.2d at 887 (citing Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 24 (1966)).

371. 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

372. *Id.* at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 871. Accordingly, since no cause of action existed for parental nonsupervision of a child, a defendant was not entitled to maintain actions against the parents for indemnification. *Id. See also* Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979); Grogan v. Comm'w, 577 S.W.2d 4 (Ky. 1979); Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979).

373. 438 F. Supp. 769 (E.D. Cal. 1977).

374. *Id.* at 780. Therefore, the United States could not be held liable for damages aris-

terpreting the Federal Torts Claim Act, the district court in *Hoesl v. United States*[375] held that, since a government employee's lawsuit was essentially a claim for defamation,[376] the plaintiff's attempt to characterize the action as medical malpractice or "some new tort" of "negligent imposition of economic loss" would fail.[377]

(g) Loss of consortium cases.—During the seventies, courts employed "new tort" terminology when reviewing cases involving claims for loss of consortium. Four cases address this issue.

In *Garza v. Kantor*,[378] children sought recovery for the loss of consortium with their father. In affirming the trial court's dismissal of the claims, the California intermediate appellate court referred to persuasive authority in fourteen other jurisdictions that distinguished a child's interest in compensation from a spouse's interest in compensation. The court reasoned that such claims would be speculative and could result in the overlap of recovery by the injured parent and by the children.[379] Concluding that neither state nor federal constitutional equal protection mandates compel recognition of the "new tort," the appellate court reiterated the differences in relationships between spouses and between parent and child.[380] The court further distinguished between the statutory right of surviving children to sue for the wrongful death of a parent, and the novel common law assertion of a child's entitlement to loss of parental consortium.[381]

In the 1976 decision, *Bessette v. St. Peter's Hospital*,[382] the

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ing out of explosion of bomb laden box cars on a theory of strict products liability.

375. 451 F. Supp. 1170 (N.D. Cal. 1978), *aff'd*, 629 F.2d 586 (9th Cir. 1980).

376. Plaintiff's complaint sought damages arising from an alleged negligently-made report by a government psychiatrist stating that the government employee was unfit for his job because of a psychiatric disorder. *Id.* at 1171.

377. *Id.* at 1175. Since "Congress did not intend to make the United States liable for . . . conduct which fits 'the traditional and commonly understood legal definition' of defamation . . . this legislative intent cannot be frustrated by calling plaintiff's cause of action something other than defamation," *id.* at 1175 (citations omitted), when the allegation in the complaint sounded in defamation by a government physician.

378. 54 Cal. App. 3d 1025, 127 Cal. Rptr. 164 (1976).

379. *Id.* at 1028, 127 Cal. Rptr. at 165.

380. *Id.* at 1028, 127 Cal. Rtpr. at 166. The equal protection arguments were advanced under U.S. CONST. amend. XIV, § 1 and CAL. CONST., art. I, § 7. The court's distinction between spousal relations and parent-child relations was stated as follows:

> These relationships are not the same. The one rests in contract. (Civ. Code, § 5100.) The other does not. The one endures for the length of the marriage; the other, generally speaking, is a continuing close familial relationship only during the minority of the child at most. Love, affection, companionship and services between adults differ in kind and not simply in degree from the same matters when they exist within the relationship of parent and child.

Id. at 1028, 127 Cal. Rptr. at 165 (footnote omitted).

381. *Id.* at 1028, 127 Cal. Rptr. at 166.

382. 51 A.D.2d 286, 381 N.Y.S.2d 339 (1976).

New York appellate court distinguished a wife's cognizable loss of consortium action against a hospital and surgeons for malpractice resulting in the amputation of her husband's right leg, from her separate claim for emotional distress arising from the incident. Reasoning that these claims were distinct, the court acknowledged that past precedent involving negligent infliction of emotional distress had amounted to "an expansion rather than a creation of a new tort concept,"[383] but determined nevertheless that the medical defendants owed no duty to the wife.

Plain v. Plain[384] entailed a novel claim by a husband against his wife for her negligence in causing an automobile accident that led her to suffer severe permanent injuries. The husband contended that, as a result of his wife's negligence, he had suffered and would continue to suffer from the loss of consortium with her. The husband argued that current case law entitled him to loss of consortium damages.[385] The Minnesota Supreme Court observed that earlier case law "did not purport to create a new cause of action, or a new tort. It merely did away with the defense to pre-existing torts. Plaintiff must first show that his interest in consortium is legally protected as against his wife, which he has failed to do."[386]

(h) Wrongful discharge cases.—Courts in three cases reported in the 1970s utilized "new torts" language to analyze novel actions by employees against their former employers for "wrongful discharge" or "wrongful termination" of employment.

In *Nees v. Hocks*,[387] the Oregon Supreme Court held that "there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that the employer must respond in damages for any injury done."[388] Accordingly, the court concluded that sufficient evidence was presented in the trial below for the jury to conclude that an employer who discharged the plaintiff for serving on jury duty should be responsible for paying the

383. *Id.* at 287, 381 N.Y.S.2d at 340.

384. 307 Minn. 399, 240 N.W.2d 330 (1976).

385. *Id.* at 400, 240 N.W.2d at 331.

386. *Id.* at 402, 240 N.W. 2d at 332 (emphasis added). *But see* Pascal v. Charley's Trucking Serv. Inc., 436 F. Supp. 455 (D.V.I. 1977) (federal district court interpreting Virgin Island's law held that a wife's complaint for loss of her husband's consortium stated a valid cause of action, *id.* at 456, but certified to the court of appeals the question of the wife's ability to seek loss of consortium because it was a "controlling question of law to which there is substantial ground for difference of opinion." *Id.* at 458).

387. 272 Or. 210, 536 P.2d 512 (1975).

388. *Id.* at 218, 536 P.2d at 515.

plaintiff compensatory damages.[389]

In reaching their holding, the justices in *Nees* first considered the plaintiff's argument that her employer's actions constituted a "prima facie tort" under the theory that intentional infliction of "temporal damages" without justification is a cause of action.[390] Recognizing the problems that arose in jurisdictions that had adopted the "prima facie tort" concept, and also recognizing the difficulties of chiselling a very broad principle of liability into a specific tort,"[391] the Oregon Supreme Court pronounced a workable jurisprudential alternative. The court referred to a wide spectrum of persuasive authority holding that an employee is entitled to compensation when an employer's reason or motive for discharging the employee interferes with an important interest of the community.[392] Since state constitutional and statutory provisions establish jury duty as an important public service, the court concluded that the defendant employer was liable for wrongful discharge damages.[393]

The Alabama Supreme Court refused to create a new cause of action for dismissal of an "at will" hospital employee in *Hinrichs v. Tranquilaire Hospital*.[394] The employee was discharged for his alleged refusal to falsify medical records. The court held that public policy considerations alone should not justify the creation of a new tort. The court believed that such creations are best left to the legislature.[395] Moreover, the per curiam opinion indicated that "[s]uch a new rule . . . would abrogate the inherent right of contract between employer and employee"[396] under Alabama law.

In a vigorous dissenting opinion, Justice Jones sought to undermine the majority's characterization of public policy grounds for recognition of new torts as being "too nebulous."[397] Jones argued that the law is fully capable of setting a sufficiently definitive standard in its application of a public policy concept.[398] He believed that such causes of action should be "limit[ed] . . . to those acts cognizable as

389. *Id.* at 219, 536 P.2d at 516.
390. *Id.* at 213, 536 P.2d at 513.
391. *Id.* at 215, 536 P.2d at 514.
392. Nees v. Hock, 272 Or. 210, 215-16, 536 P.2d 512, 515 (1975).
393. *Id.* at 218-19, 536 P.2d at 516. The court reversed in part, however, on the issue of the jury's award of punitive damages because of concern that the defendant may not have known that his actions were inherently wrongful. *Id.* at 220-21, 536 P.2d at 516-17.
394. 352 So. 2d 1130 (Ala. 1977).
395. *Id.* at 1131.
396. *Id.*
397. *Id.* at 1132 (Jones, J., dissenting).
398. *Id.* The dissent also pointed out that "the law is not unaccustomed to dealing with the 'public policy' concept," as exemplified by precedent voiding otherwise legally binding contracts on public policy grounds. *Id.* at 1133.

a crime or to conduct so morally reprehensible as to be commonly recognized as offensive to the public good."[399]

(i) Minority shareholder cases.—During the seventies, a number of tort actions were adjudicated involving minority shareholder actions against majority shareholders of business corporations. Due in large measure to a seminal law review article entitled *Going Private — Old Tort, New Tort or No Tort?*,[400] published in 1974, courts increasingly referred to "new torts" parlance in deciding these cases.

Two cases reflect detailed analysis of equitable considerations underlying minority shareholder actions. In *Berkowitz v. Power/Mate Corp.*,[401] a New Jersey trial court enjoined a proposed merger that would "freeze-out" the minority shareholder interests. Referring to the Borden *Old Tort/New Tort* article and other authorities, the court characterized the proposed merger and "freeze-out" mergers in general as "serious, unfair, and sometimes disgraceful, a perversion of the whole process of public financing, and a course that inevitably is going to make the individual shareholder even more hostile to American corporate mores and the securities markets than he already is."[402]

Likewise, in *Green v. Santa Fe Industries, Inc.*,[403] the United States Court of Appeals for the Second Circuit discussed at some length the equitable considerations in a "going private" transaction. Noting that its "finding of fraud inherent in the freezing out of a splinter interest in the context of a 'going private' transaction that lacks corporate purpose is not without scholarly or judicial support,"[404] the *Green* court found such allegations cognizable under securities laws.[405]

(j) Insurance tort cases.—In three cases decided during the 1970s, courts explored the wisdom of recognizing "new tort" causes of action against insurance companies for the alleged breach of duty

399. Hinrichs v. Tranquilaire Hosp., 352 So.2d 1130, 1132 (Ala. 1977).

400. *See* Borden, *Going Private — Old Tort, New Tort or No Tort?*, 49 N.Y.U. L. REV. 987 (1974).

401. 135 N.J. Super. 36, 342 A.2d 566 (1975).

402. *Id.* at 43, 342 A.2d at 570 (quoting Sommer, *"Going Private": A Lesson in Corporate Responsibility*, Sec. Reg. & L. Rep. (BNA) No. 278 (Nov. 20, 1974)).

403. 533 F.2d 1283 (2d Cir. 1976).

404. *Id.* at 1290 (citing, *inter alia*, Borden, *supra* note 400). *But see id.* at 1299, 1306, 1308 (Moore, J., dissenting) (citing Borden, *supra* note 400 as support for dissenter's argument).

405. *Id.* at 1291.

to protect policy holders and their beneficiaries.

Eckenrode v. Life of America Insurance Co.[406] involved a suit by a beneficiary of a life insurance policy against the life insurance company. The complaint alleged mental distress stemming from the insurer's economic coercion in refusing to make payments on the policy. The Seventh Circuit Court of Appeals cited the Illinois Supreme Court's recognition of the "new tort" of intentional infliction of severe emotional distress[407] and reversed the district court's dismissal of the complaint. Linking the type of injury suffered by the plaintiff with the kind of business practiced by the defendant, the Seventh Circuit went on to note that the "insurance business affects a great many people, is subject to substantial governmental regulation and is stamped with a public interest."[408]

In a 1977 case, *Santilli v. State Farm Life Insurance Co.*,[409] the Oregon Supreme Court mentioned a "new tort" named "tortious breach of an insurer's duty of 'good faith and fair dealing' when dealing with its insured."[410] The court acknowledged that such an insurance based cause of action was a distinct tort that had recently emerged in California and had found favor in other jurisdictions.[411] The court held, however, that it was not necessary to decide whether to recognize the new tort because the plaintiff in the case before it could not prevail on such a cause of action; plaintiff's decedent falsely answered his life insurance application.[412]

In *Debolt v. Mutual of Omaha*,[413] the Illinois Appellate Court reviewed the trial court's dismissal of certain counts of a complaint against a disability insurance company. The insured had brought an action to recover punitive damages for breach of the duty of good faith and fair dealing and compensatory damages for intentional infliction of emotional distress. In affirming the trial court's dismissal of these counts, the appellate court rejected Illinois authority that held that "a breach of contract itself may constitute an unusual case where an independent willful tort will be found and that punitive damages may be recovered."[414] The *Debolt* court found it important

406. 470 F.2d 1 (7th Cir. 1972).

407. *Id.* at 3 (citing Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961)).

408. *Id.* at 5 (citations omitted). The court also observed "that insurance contracts are subject to the same implied conditions of good faith and fair dealing as are other contracts." *Id.* (footnote omitted).

409. 278 Or. 53, 562 P.2d 965 (1977).

410. *Id.* at 61, 562 P.2d at 969.

411. *Id.* (citations omitted).

412. *Id.* at 62-63, 562 P.2d at 970.

413. 56 Ill. App. 3d 111, 371 N.E.2d 373 (1978).

414. *Id.* at 114, 371 N.E.2d at 376 (citing Ledingham v. Blue Cross, 29 Ill. App. 3d

that the state legislature provided a statutory remedy to insureds in the event that an insurance company refused to pay or honor its contract in an unreasonable or vexatious manner.[415] Regarding judicial creativity in expanding the ambit of tort law, the court stated:

> We readily acknowledge that the courts throughout our nation have been busy for several decades making new inroads in the law of tort, however, we do not deem the making of law by judicial decree to be a desirable practice per se but *should be limited to instances when humanitarian needs dictate the necessity of judicial action or when legislative bodies for an unreasonably long time refuse to enact statutory law for the purpose of coping with an enduring and festering problem.* In the instant case there is statutory law of long duration which was enacted to assist an insured as against an unreasonable and vexatious insurer.[416]

(k) Miscellaneous cases.—Various case opinions decided during the 1970s responded to the innovative efforts of litigants and their counsel to stake out radical new torts that courts had rarely, if ever, considered. The majority of these cases resulted in the judiciary's refusal to recognize unique theories. For example, courts rejected such claims as (1) "extortion" and "coercion and duress;"[417] (2) "wilful refusal to make a good faith correction of a libelous news story;"[418] (3) "intrusion into the attorney-client relationship" for breach of an attorney disciplinary rule;[419] (4) delay of the state in appropriating property for public use under a statutory provision;[420] and, (5) "computer malpractice."[421]

339, 330 N.E.2d 540 (1975)).

415. *Id.* at 115-16, 371 N.E.2d at 377 (citing ILL. REV. STAT. ch. 73, para. 767 (1975)) (permitting an insured to recover limited attorney's fees if it appears to the court that an insurer's refusal to pay is vexatious and without reasonable cause).

416. *Id.* at 116-17, 371 N.E.2d at 378 (emphasis provided).

417. Leventhal v. Dockser, 361 Mass. 894, 282 N.E.2d 680 (1972).

418. Waskow v. Associated Press, 462 F.2d 1173, 1177 (D.C. Cir. 1972).

419. Noble v. Sears, Roebuck & Co., 33 Cal. App. 3d 654, 658-59, 109 Cal. Rptr. 269, 271-72 (1973).

420. J.P. Sand & Gravel Co. v. State, 51 Ohio App. 2d 83, 367 N.E.2d 54, 60 (1976) (McCormack, J., concurring).

421. Chatlos Systems, Inc. v. National Cash Register Corp., 479 F. Supp. 738 (D.N.J. 1979). The district court stated:

> The novel concept of a new tort called "computer malpractice" is premised upon a theory of elevated responsibility on the part of those who render computer sales and service. Plaintiff equates the sale and servicing of computer systems with established theories of professional malpractice. Simply because an activity is technically complex and important to the business community does not mean that greater potential liability must attach. In the absence of sound precedential authority, the Court declines the invitation to create a new tort.

In a few cases decided during this period, however, courts recognized a few miscellaneous new claims using "new torts" terminology. For instance, the intermediate New Mexico appellate court in *Maxey v. Quintana*[422] held that "negligent misrepresentation is an action upon which relief can be granted, that it is a tort determined by the general principles of the law of negligence and that it is an action separate from the action of fraud or deceit."[423] Similarly, the California Court of Appeals in *Lowell v. Mother's Cake & Cookie Co.*,[424] while admitting that intentional interference with prospective business advantage was a vague "new tort,"[425] held that a cause of action was stated. In *Lowell* the plaintiff alleged that the defendant had informed prospective purchasers of the business that the delivery contract with defendant would be terminated so as to discourage potential buyers from purchasing the business and to depress its purchase price below market value.

Moreover, in *Tully v. Pate*,[426] which involved "a fight between an estranged husband and his sister-in-law over the bodies of his dead children,"[427] the court recognized two new torts: "intentional interference with the burial right" and "intentional interference with the privilege to attend the funeral of a member of one's immediate family."[428] The district court based its recognition of these bizarre new torts on proper allegation of all the elements of a prima facie tort.[429]

On occasion, some judges utilized "new tort" language in dissenting or concurring opinions while attempting to disparage the validity of majority holdings. In a wrongful death action on behalf of a 16-year-old who was killed when his motorcycle struck a steel cable placed on land by the defendants, the court allowed the defendants to seek contribution in the same action against the boy's parents for negligent entrustment.[430] The dissent contended that "no apportionment may be had absent a breach of duty owing to the injured infant. In this respect . . . the majority seems to be creating a new tort cause of action which defendants may assert directly against

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Id. at 740-41 n.1.

422. 84 N.M. 38, 499 P.2d 356 (1972).

423. *Id.* at 42, 499 P.2d at 360 (citing RESTATEMENT (SECOND) OF TORTS § 552 (1965)).

424. 79 Cal. App. 3d 13, 144 Cal. Rptr. 664 (1978).

425. *Id.* at 19, 144 Cal. Rptr. at 667-68.

426. 372 F. Supp. 1064 (D.S.C. 1973).

427. *Id.* at 1065-66.

428. *Id.* at 1070-71.

429. *Id.* at 1071.

430. Nolechek v. Gesuale, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978).

[the father]."[431]

The dissent in *Dubreuil v. Pinnick*[432] used a similar argument in attacking the majority holding. The *Dubreuil* court held that sufficient evidence existed to render liable for false imprisonment a person who had filed an affidavit requesting plaintiff's arrest. The dissent objected by asserting that "[t]o the extent that the majority impose liability upon [defendant] because of her motive in executing the affidavit, then it would appear that the majority have contravened the foregoing authority and have created a new tort."[433]

C. *Judicial Creativity Consolidated, 1980-1988*

During the eighties the number of cases using "new tort" parlance exploded. Courts frequently utilized "new tort" terminology while they reviewed new causes of action, reconsidered legal barriers to tort recovery, interpreted statutory rights, and examined novel procedural issues. The raw number of "new tort" cases decided during the eighties was approximately three times those written during the seventies; the number of recurring problem areas also increased substantially. The number of categories of novel questions with recurring patterns increased from ten[434] to seventeen tort typologies. New tort categories that emerged during the 1980s included: noninsurance bad faith cases; intentional spoliation of evidence disputes; emergency response compensation cases; breach of confidence actions; negligent misrepresentation matters; abuse of litigation claims; and contractual/economic interference torts.

Courts construed a more diverse group of statutory tort causes of action including new "constitutional tort" actions involving construction of various constitutional provisions. In addition, the type and number of "new tort" application problems also increased.

1. Statutory and Constitutional Construction Cases.—Two federal court decisions considered the arguments for recognition of novel constitutional tort claims. In both cases, the courts utilized the unique federal constitutional "special factors analysis" to determine

431. *Id.* at 349, 385 N.E.2d at 1279, 413 N.Y.S.2d at 351 (Cooke, J., dissenting). "The problem with this, of course, is that [the defendants] have not suffered any injury recognized by tort law." *Id.*

432. 178 Ind. App. 526, 383 N.E.2d 420 (1978).

433. *Id.* at 536, 383 N.E.2d at 427 (Young, J., dissenting).

434. These categories of novel questions included: invasion of privacy cases, intentional infliction of emotional distress, negligent infliction of emotional distress, wrongful birth/wrongful life, product liability, abolition of immunities, loss of consortium, wrongful discharge, minority shareholder, and insurance tort causes of action.

whether implying a cause of action under *Bivens*[435] is appropriate.[436]

In *Reuber v. United States*[437] a research pathologist sued his employers, two government contractors, and the National Cancer Institute because his supervisors had written and disseminated a letter of reprimand that accused him of mischaracterizing personal research as being endorsed by the National Cancer Institute.[438] Dr. Reuber alleged that these actions violated his first amendment rights of freedom of association, freedom of speech and privacy, as well as his fifth amendment right to procedural due process, and led to his "constructive discharge" and resulting mental distress.[439]

In a plurality opinion, the court held that no special factors could bar a constitutional tort action against Reuber's employers.[440] Partially dissenting, Judge Starr claimed that three "special factors" made a *Bivens* constitutional tort action undesirable: (1) the private status of the defendants; (2) the relationship of Reuber's opinions to his employer's government contract research business; and (3) the availability of a state law defamation remedy.[441] The dissent was vitally concerned with "the systematic consequences" of creating a particular constitutional tort action.[442] Judge Starr believed that the availability of a remedy under common law was the key reason why the courts should not recognize a constitutional tort.[443]

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435. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

436. The history of constitutionally based actions for money damages or "constitutional tort cases," began with Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court fashioned the hybrid tort/constitutional principle that citizens can bring an action to recover damages for fourth amendment violations caused by federal officials acting in their official capacity, notwithstanding the lack of a congressionally authorized cause of action. In subsequent cases, the Supreme Court extended this principle to citizens seeking to fit their cause of action under the fifth amendment, *see* Davis v. Passman, 442 U.S. 228 (1979), and the eighth amendment, *see* Carlson v. Green, 446 U.S. 14 (1980). Other courts have implied constitutional damage actions for violations of the first amendment. *See, e.g.*, Dellums v. Powell, 566 F.2d 167, 195-96 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

The scholarly literature on constitutional torts is extensive. *See* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969); Love, *Damages: A Remedy for Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242 (1978); Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986); Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Piphus*, 93 HARV. L. REV. 966 (1980).

437. 750 F.2d 1039 (D.C. Cir. 1984).

438. *Id.* at 1044-45. Reuber forwarded his research paper, using government letterhead, to certain litigants in California. This led to the misconception that the National Cancer Institute had endorsed Reuber's study. *Id.*

439. *Id.* at 1053-54 (citation omitted).

440. Judge Bork filed his own concurring opinion as to the judgment regarding only the plaintiff's constitutional tort claim. *Id.* at 1063-69. Judge Starr filed a separate opinion concurring in part and dissenting in part. *Id.* at 1069-76.

441. *Id.* at 1069-76 (Starr, J., dissenting in part and concurring in part).

442. Reuber v. United States, 750 F.2d 1039, 1072 n.7 (D.C. Cir. 1984).

443. *Id.* at 1073.

In *Stepanian v. Addis*,[444] the court applied a "special factors" analysis and decided not to imply a constitutional tort damages action.[445] The plaintiff in *Stepanian* alleged that a Justice Department attorney had defamed him during a news conference that addressed plaintiff's grand jury indictment. A majority of the *Stepanian* court endorsed the three "special factors" articulated by the district court as grounds for not implying a new due process constitutional tort cause of action.[446] The "special factors" that the court analyzed were: (1) the public interest in keeping a free flow of information to aid the federal prosecutor's law enforcement activities; (2) the difficulty in defining what "process" is due a person before the government can release information, and in determining the availability of a remedy under the common law for libel and slander; and (3) the fact that the criminal trial provided the plaintiff with a full opportunity to clear his name, even if not with monetary compensation as well.[447]

Two federal court cases decided during the eighties referred to the phrase "new tort" while interpreting railroad workers' rights under the Federal Employer's Liability Act (FELA).[448] In *Lancaster v. Norfolk and Western Railway Co.*,[449] the Seventh Circuit acknowledged that FELA did not create a cause of action for tortious acts lacking physical contact and conceded that no court has decided that any "new torts" give rise to FELA liability.[450] By "new torts," the court meant wrongful discharge or intentional infliction of emotional distress causes of action.[451] The court of appeals held that the plaintiff had asserted a claim cognizable under FELA for "violation of one of the traditional 'physical' torts such as assault, battery, and negligent infliction of personal injury."[452]

In *Gillman v. Burlington Northern Railroad Co.*,[453] the court found that a railroad worker's claim for negligent infliction of emotional distress was cognizable under FELA.[454] The *Gillman* court explained its recognition of negligent infliction of emotional distress under FELA on the basis that FELA jurisprudence has looked to

444. 782 F.2d 902 (11th Cir. 1986).
445. *Id.* at 904.
446. *Id.*
447. *Id.*
448. 45 U.S.C. §§ 51-60 (1982).
449. 773 F.2d 807 (7th Cir. 1985).
450. *Id.* at 815.
451. *Id.*
452. *Id.*
453. 673 F. Supp. 913 (N.D. Ill. 1987).
454. *Id.* at 916.

common law development for guidance.[455]

During the 1980s, several state appellate courts employed "new tort" language while construing private rights under various statutes. In *Bob Godfrey Pontiac, Inc. v. Roloff*,[456] the Oregon Supreme Court considered an action against two attorneys for "intentional violations of the statutory duties of an attorney."[457] In analyzing whether an attorney's violation of an ethical duty imposed by statute or by the *Code of Professional Responsibility* gave rise to a new and private cause of action independent of the common law,[458] the *Godfrey Pontiac* court distinguished between cases involving an underlying common law cause of action and cases not involving an underlying common law cause of action when liability is based upon violation of a statutory duty.[459] Noting that a typical illustration of the former type of case is a negligence per se action, the majority pointed out that the standard for determining whether violation of the statute gives rise to a finding of negligence is "(1) whether the injured person is a member of the class intended by the legislature to be protected and (2) whether the harm is of the kind which the statute was intended to prevent."[460] When no underlying common law cause of action exists, the *Godfrey Pontiac* court said it must go beyond the protected class/prevented harm inquiry to determine whether any explicit or implicit legislative intent suggests that a violation of a statute should give rise to a tort cause of action.[461]

The *Godfrey Pontiac* court also surveyed the cases and commentary of other jurisdictions that have addressed the issue of whether an attorney's violation of statutory duties or the *Code of*

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455. *Id.* (quoting Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 562 (1987)).

456. 291 Or. 318, 630 P.2d 840 (1981).

457. *Id.* at 321, 630 P.2d at 842.

458. *Id.* at 324-25, 630 P.2d at 844.

459. *Id.*

460. *Id.* at 326, 630 P.2d at 845 (citing Stachniewicz v. Mar-cam Corp., 259 Or. 583, 586, 488 P.2d 436, 438 (1971)). *Stachniewicz* has since been overruled by Davis v. Billy's Con-Teena, Inc., 284 Or. 351, 587 P.2d 175 (1978).

461. Bob Godfrey Pontiac Inc. v. Roloff, 291 Or. 318, 326, 630 P.2d 840, 845 (1981) (citing Miller v. City of Portland, 288 Or. 271, 278, 604 P.2d 1261, 1965 (1980)). The majority opinion defined this standard in instrumentalist terms:

> If no intent either way is evident from the statute, then, . . . this court must attempt to ascertain how the legislature would have dealt with the problem had it been considered by the legislature. This is usually done . . . by *looking at the policy giving birth to the statute and determining whether a civil tort action is needed to carry out that policy.*

Id. (citing *Miller*, 288 Or. at 278, 604 P.2d at 1265 (emphasis in original)). Later in the opinion the court noted that the RESTATEMENT (SECOND) OF TORTS § 874A presents a similar approach. *Id.* at 330, 630 P.2d at 847.

Professional Responsibility gives rise to a private cause of action and noted that most authorities were against implying a new tort cause of action.[462] Finally, the court observed that the existence under the common law of the absolute privilege against defamation for statements made in judicial proceedings, and the "special injury" requirement in malicious prosecution actions, would not support the recognition of the new statutory tort.[463] In light of these policies and the risk that recognizing a statutory cause of action would interfere with the legislative scheme,[464] the court declined to create a new private cause of action.

In a concurring opinion in *Godfrey Pontiac*, Justice Linde agreed with the majority's decision not to imply a statutory tort, but said that the appropriate inquiry in such cases is to decide "whether defendant's act violated the law and caused an injury of the kind and to the kind of person contemplated by the protective law, and whether the legislature meant some other remedy or method of enforcement to be exclusive."[465] Justice Linde also said that the courts should not assume that statutory silence means that the plaintiff should not be entitled to recovery.[466]

In *Nearing v. Weaver*,[467] a mother and her children brought an action against police officers for damages to their psychic and physical health as a result of the police officer's failure to enforce a restraining order against the father. Justice Linde, writing for the majority, applied his analysis in the *Godfrey Pontiac* concurrence[468] and held that the mother and her children stated a cause of action under Oregon's Abuse Prevention Act[469] for the officer's failure to take the father into custody.[470] The statute requires the police to ar-

462. The court observed that:

> (a) The statute or Code of Professional Responsibility was not intended to create a private cause of action. On the contrary, the sole intended remedy for a violation . . . is the imposition of discipline by disbarment, suspension or reprimand of the offending attorney.
>
> (b) Other remedies, such as malicious prosecution, adequately protect the public from harassment or abuse of unprofessional lawyers.
>
> (c) To expose attorneys to actions for damages for breach of ethical duties imposed by such statutes and codes would be contrary to the "obvious public interest" in affording every citizen "the utmost freedom of access to the courts."

Id. at 331, 630 P.2d at 848 (citations omitted).

463. *Id.* at 333, 630 P.2d at 850.

464. *Id.* at 335, 630 P.2d at 851.

465. *Id.* at 340, 630 P.2d at 854 (Linde, J., concurring).

466. Bob Godfrey Pontiac, Inc. v. Roloff, 291 Or. 318, 340, 630 P.2d 840, 854 (1981).

467. 295 Or. 702, 670 P.2d 137 (1983).

468. *See supra* notes 465-66 and accompanying text.

469. OR. REV. STAT. § 133.310(3) (1987).

470. 295 Or. at 704, 670 P.2d at 139.

rest a person when there is probable cause that a domestic relations court order has been violated.[471] The *Nearing* court reasoned that the statutory provisions were unique in that the legislature had chosen mandatory arrest as the best way to reduce domestic violence.[472] Because the statute identified precisely "when, to whom, and under what circumstances police protection must be afforded,"[473] the court was able to justify finding a cause of action against the police officers under the statute. The concurring opinion in *Nearing* agreed that the trial court should not have granted the police officer's summary judgment motion because the plaintiffs stated a claim of negligence per se.[474]

Two dissenting justices sharply criticized the majority for ignoring Oregon precedent that had refused to recognize new statutory torts.[475] The dissent proffered four reasons why the court should not recognize a common law new tort: (1) a rule of strict liability was at odds with the tort law's customary concern with unreasonable conduct; (2) the new cause of action could severely disrupt law enforcement practices and exacerbate municipal finances; (3) before creating "new law," interested parties such as cities and counties needed to contribute input, and the legislature was the best forum for such input; and, (4) courts should not create a new tort without reading briefs and hearing arguments.[476]

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471. OR. REV. STAT. § 133.310(3) (1987).

472. Nearing v. Weaver, 295 Or. 702, 712, 670 P.2d 137, 143 (1983). The court further stated that "[t]he legislative purpose in requiring the police to enforce individual restraining orders clearly is to protect the named persons for whose protection the order is issued, not to protect the community at large by general law enforcement activity." *Id.*

473. *Id.*

474. *Id.* at 714-17, 670 P.2d at 145-46 (Jones, J., concurring). According to the concurring opinion:

> When plaintiff's counsel first read the majority opinion in this case, they will probably feel like the child at Christmas who asked Santa Claus for a stuffed teddy bear, but instead received a real live cub. They received much more than they requested and the gift may prove to be not only awkward, but also dangerous.
>
> The plaintiffs prayed for a claim of relief based solely on negligence; they received a claim of relief called "statutory tort." The results of a "statutory tort" are speculative and may be harsh. For instance, is "discretion" always eliminated as a defense? Does comparative fault apply? Is a totally innocent act actionable? To what precedent are we cited for direction?

Id. at 714-15, 670 P.2d at 145.

> I predict that future case law will probably develop, as it has in the products liability field where "strict liability" claims are gradually eliminating negligence claims, to the point where we will have a new class of "statutory tort" claims which will replace the traditional "statutory negligence per se" claims.

Id. at 717, 670 P.2d at 146.

475. *Id.* at 718-28, 670 P.2d at 146-53 (Peterson, J., dissenting).

476. *Id.* at 725-28, 670 P.2d at 151-52.

In other cases decided during the 1980s, courts employed the phrase "new tort" to decide whether particular statutory enactments gave rise to independent rights. These statute-related cases can be subdivided into four categories: (1) family dispute cases; (2) liquor liability cases; (3) employment and civil rights cases; and (4) miscellaneous cases.

(a) Family dispute statutory cases.—Courts considered four cases involving "new torts" interpretation of statutory family law provisions. *Williams v. Ali*[477] was the most provocative case. *Williams* involved an action against Muhammad Ali for alleged sexual assault that resulted in the birth of a child. The plaintiff's theory was that she had suffered continuing injury because Ali had failed to support the child as required by a paternity statute. The court held the claim to be barred by the statute of limitations and rejected the mother's attempt to allege a "new tort" in an effort to "breathe life into her stale claim for sexual assault."[478] The *Williams* court accused the plaintiff of "purposefully or inadvertently confus[ing] her son's statutory remedy under the Paternity Act with her remedy in tort for sexual assault."[479]

Blucher v. Ekstrom[480] involved an action against an automobile driver and owner to recover compensation for injuries to the plaintiff's mother. The plaintiff alleged that because of the accident, her mother could not care for herself and had been rendered financially destitute. The plaintiff claimed that because she had a statutory duty to care for her mother since her mother was financially incapable of caring for herself, the driver who hit her mother should compensate plaintiff.[481] The *Blucher* court dismissed the claim and observed that "[t]he statute carries no hidden meaning. It does exactly what it purports to do, that is, require an adult child to support a destitute parent if the child has the ability to do so. What the Act does not do is create a new tort."[482]

Two 1988 decisions by the California Court of Appeal, *Hobbs v.*

477. 145 Ill. App. 3d 458, 495 N.E.2d 1052 (1986).

478. *Id.* at 461, 495 N.E.2d at 1054.

479. *Id.* at 462-63, 495 N.E.2d at 1055. In another portion of the opinion, the court distinguished Illinois precedent that afforded long arm jurisdiction over an out-of-state parent for recovery of child support based on the word "tortious" in the statute from a substantive tort claim against a noncustodial parent for failure to provide child support. *Id.* at 462, 459 N.E.2d at 1054-55.

480. 68 Md. App. 459, 513 A.2d 923 (1986), *vacated*, 309 Md. 458, 524 A.2d 1235 (1989).

481. *Id.* at 462, 513 A.2d at 924.

482. *Id.* at 466, 513 A.2d at 926.

Christenson[483] and *Spellis v. Lawn*,[484] rejected arguments for judicial creation of new torts. In both cases, the plaintiffs based their new tort causes of action on statutory mandates that required parents to support their minor children. In *Hobbs*, an illegitimate child who had reached the age of majority sued her natural father for the damages she incurred because of her father's failure to support her during her minority; alternatively she sought retroactive child support.[485] The *Hobbs* court refused to create a new tort that would compensate the plaintiff for the years she was denied the lifestyle she was entitled to had her father paid statutory child support obligations.[486] Although concerned about the statutory obligation of a parent to support his child, the *Hobbs* court was more concerned about whether it should create a common law tort.[487] The court was afraid that if it recognized a new tort in the *Hobbs* scenario, it would "open up a Pandora's box of litigation that springs from consensual sexual acts of individuals."[488]

Spellis v. Lawn involved an issue similar to the one in *Hobbs*. In *Spellis*, however, the father had been subject to court ordered child support.[489] Although the *Spellis* court observed that the case presented "fascinating questions of first impression,"[490] the court nonetheless dismissed the claim because the statute of limitations barred it.[491]

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483. 198 Cal. App. 3d 189, 243 Cal. Rptr. 633 (1988) (case deleted from 198 Cal. App. 3d by order of the Supreme Court dated April 28, 1988).

484. 200 Cal. App. 3d 1075, 246 Cal. Rptr. 385 (1988).

485. *Hobbs*, 243 Cal. Rptr. at 634.

486. *Id.* at 635 (footnote omitted).

487. In this respect, the court engaged in common law reasoning through analogy to statutory provisions. *See generally*, Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936); Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U.L. REV. 401 (1968).

488. Hobbs v. Christenson, 198 Cal. App. 3d 189, 243 Cal. Rptr. 633, 635 (1988) (case deleted from 198 Cal. App. 3d by order of the Supreme Court dated April 28, 1988).

489. The child support order was incident to a 1963 divorce decree which required the father to pay $40 a week in child support. After a subsequent remarriage to his wife and second divorce from the same woman, the judicial support order increased to $50 per week. The father went into hiding, changed his name, and evaded all support obligations for 16 years. *Spellis*, 200 Cal. App. 3d at 1077, 246 Cal. Rptr. at 386.

490. The "fascinating questions" that the case presented were:

> Do allegations of a parent's clandestine name-change and deliberate concealment of his or her whereabouts, in an effort to escape paying court-ordered child support, state a cause of action for fraud? Is such conduct "outrageous" enough to constitute intentional infliction of emotional distress? Should the child "victim" of such parental abandonment be limited to recovery of only back-due support payments or should he or she be allowed compensatory damages for the years of hardship?

Spellis v. Lawn, 200 Cal. App. 3d 1075, 1078, 246 Cal. Rptr. 385, 387 (1988).

491. "[T]he plaintiffs could have stated a cause of action. Violation of a statutory duty is generally actionable in tort regardless of whether the statute provides a specific civil rem-

(b) Liquor statutory cases.—During the 1980s, the courts considered "new torts" in seven cases arising under liquor liability statutes. In *Sanders v. Officers Club of Connecticut, Inc.*,[492] the Connecticut Supreme Court emphasized that Connecticut's Dram Shop statute[493] created "new tort liability" that eased the traditional proximate cause requirement in tort and affirmed a jury verdict for the plaintiff.[494] The court said that the statute did not require a causal relation between the sale of liquor and the plaintiff's injuries.[495] In a 1987 case, *American Universal Insurance Co. v. DelGreco*,[496] the Connecticut Supreme Court held that the state's insurance statute prohibited an insurer from reducing its liability for underinsured motorist coverage by the amount the insured received from a liquor establishment pursuant to a Dram Shop statute.[497]

The Pennsylvania Supreme Court, in *Matthew v. Konieczny*,[498] expanded the liability of liquor licensees beyond the express words of the state liquor code.[499] The *Matthew* majority found support for its reading of the state liquor code in the public policy of protecting minors and the public from the harmful effects of alcohol.[500] The majority conceded that to interpret the statute so that liquor licensees would not be liable for any injuries arising from a sale of alcohol to minors would result in the anomalous situation in which licensees would be less liable than social hosts.[501] The *Matthew* court grafted the social policy argument that prevailed in the social host liability case onto the liquor code's specific limitation of civil liability for licensees.[502] In a dissenting opinion, Justice Nix disparaged the

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edy." *Id.* at 1082, 246 Cal. Rptr. at 389 (Sonenshine, J., concurring).

492. 196 Conn. 341, 493 A.2d 184 (1985).

493. CONN. GEN. STAT. ANN. § 30-102 (West 1990).

494. 196 Conn. at 349, 493 A.2d at 190 (citations omitted).

495. *Id.*

496. 205 Conn. 178, 530 A.2d 171 (1987).

497. *Id.* at 198, 530 A.2d at 182. The court construed the insurance regulation, which stated that an insurance policy "may provide for the reduction of the insurer's liability to the extent that damages have been . . . paid by or on behalf of any person responsible for the injury," CONN. AGENCIES REGS. § 38-175a-6(d), as inapplicable to the case at bar. The rationale for this holding was that since the dram shop statute "create[d] a new tort liability," it was inappropriate to construe a victim-insured's receipt of a tort judgment against a liquor establishment under the statute as falling within the ambit of the insurance regulations collateral source rule. *American Universal*, 205 Conn. at 199, 530 A.2d at 182.

498. 515 Pa. 106, 527 A.2d 508 (1987).

499. *Id. Cf.* Christiansen v. Campbell, 285 S.C. 164, 328 S.E.2d 351 (1985) (new civil tort damage cause of action implied from penal statute proscribing sale of beer to an intoxicated person).

500. Congini v. Portersville, 504 Pa. 157, 470 A.2d 515 (1983).

501. *Matthew*, 515 Pa. at 129-30, 470 A.2d at 520 (Zappala, J., dissenting).

502. The liquor statute imposed liability on a liquor licensee who sold liquor "to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards,

majority for creating a "new tort" based merely on a national trend,[503] and for intruding into the province of the legislature since the Pennsylvania liquor industry is so carefully regulated by the legislature.[504]

In three cases, courts either limited the applicability of liquor liability statutes to certain claims or precluded actions that sought to supplement the liability provisions of the respective statutes. In *Gardner v. Wood*,[505] the Michigan Supreme Court refused to imply a new tort cause of action against a banquet facility that violated a penal statute prohibiting consumption of alcohol on unlicensed premises. The court observed that "[w]hile it is part of the court's historic common-law function to develop the law, a degree of caution must be exercised in fashioning civil remedies where a balance struck by a comprehensive regulatory scheme could be undermined."[506]

Taking a different approach to restricting liability under a liquor liability statute, the Illinois Supreme Court in *Hopkins v. Powers*,[507] held that a tavern whose employee served liquor to an intoxicated person who later caused an injury, was not subject to a contribution action brought by the tavern customer.[508] The majority based its holding on an interpretation of the state contribution statute, which allowed contribution from a person "liable in tort,"[509] juxtaposed with the state Dram Shop law.[510] Interpreting the Dram Shop statute to limit a liquor establishment's liability to nontort liability created by the legislature, the *Hopkins* majority denied the customer's contribution action against the tavern.[511] Disagreeing with the majority's characterization, one dissenting opinion con-

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or persons of known intemperate habits." *Id.* at 513 (quoting Pa. Liquor Code, PA. STAT. ANN. tit. 47, § 40493(1) (Purdon Supp. 1989)).

503. Matthew v. Konieczny, 515 Pa. 106, 129, 527 A.2d 508, 520 (1987) (Nix, J., dissenting).

504. *Id.*

505. 429 Mich. 290, 414 N.W.2d 706 (1987).

506. *Id.* at 304, 414 N.W.2d at 712. In a footnote expounding upon its rationale, the majority opinion stated that implying a tort cause of action "could also work against an agency's objectives and result in over-enforcement of regulations. In certain regulatory schemes, this could result in upsetting the delicate balance created by the Legislature." *Id.* at 304 n.7, 414 N.W.2d at 712 n.7 (citing O'Neil, *Public Regulation and Private Rights of Action*, 52 CAL. L. REV. 231, 261-67 (1964); Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981); Comment, *Private Rights of Action Under Amtrack and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975)).

507. 113 Ill. 2d 206, 497 N.E.2d 757 (1986).

508. *Id.* at 212, 497 N.E.2d at 760.

509. ILL. ANN. STAT. ch. 70, para. 302(a) (Smith-Hurd 1989).

510. *Hopkins*, 113 Ill. 2d at 211-12, 497 N.E.2d at 758-59. *See* ILL. ANN. STAT. ch. 43, para. 135 (Smith-Hurd 1986).

511. *Hopkins*, 113 Ill. 2d at 211, 497 N.E.2d at 759.

tended that Dram Shop statutes were an example of "legislative provisions creating new tort rights."[512]

Echoing part of the *Hopkins* Court rationale, the Vermont Supreme Court in *Winney v. Ransom & Hastings, Inc.*[513] held that Vermont's Dram Shop statute[514] provided an injured party's exclusive remedy against a liquor establishment for serving liquor to an intoxicated customer who later caused personal or property damages.[515]

(c) Employment and civil rights statutory cases.—During the eighties, two United States District Court opinions used "new tort" language in gauging the impact of state antidiscrimination statutes and administrative remedies on the availability of a common law action for wrongful discharge based on age discrimination. In *Greene v. Union Mutual Life Ins. Co.*,[516] the court expressed concern that "creation of a new tort would duplicate the remedies already provided [to protect] the statutorily-created right to be free from age discrimination and is, therefore, not necessary or proper."[517]

Similarly, the district court in *Lemon v. Tucker*[518] surveyed Illinois case law and concluded that the relatively new tort of "retaliatory discharge" did not include a civil cause of action for age discrimination.[519] The court's holding was significant because the

512. Hopkins v. Powers, 113 Ill. 2d 206, 215, 497 N.E.2d 757, 761 (1986) (Simon, J., dissenting) (quoting RESTATEMENT (SECOND) OF TORTS § 874A, comment b (1979)) ("examples of legislative provisions creating new tort rights are civil rights acts, dram shop statutes, and dog-bite statutes").

513. 149 Vt. 213, 542 A.2d 269 (1988).

514. VT. STAT. ANN. tit. 7, § 501 (1988).

515. The court said:

> Vermont's Dram Shop Act . . . created a [new tort and] a remedy which was unavailable under traditional common law principles, and it prescribed a specific method of enforcement . . . . [I]t follows that Vermont's Dram Shop Act provides the exclusive remedy for cases falling within its scope, and preempts a cause of action in common law negligence.

Id. at ____, 512 A.2d 270.

516. 623 F. Supp. 295 (D. Me. 1985).

517. *Id.* at 299 (citations omitted). The court continued:

> Moreover, creation of the common law action based on the public policy against age discrimination would disrupt the delicate balance represented by the remedial scheme set forth in the statute . . . . For example, the Human Rights Act and ADEA have prescribed statutes of limitations, conciliation provisions and damages provisions which would be undermined by allowance of a new tort remedy.

Id. (citation omitted).

518. 625 F. Supp. 1110 (N.D. Ill. 1985).

519. *Id.* at 1117 (citing Palmateer v. Int'l Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Mein v. Masonite Corp., 109 Ill. 2d 1, 485 N.E.2d 312 (1985)).

Illinois Human Rights Act (IHRA)[520] provided victims of discrimination with more legal rights than they had prior to the enactment of that Act.[521] Accordingly, the court concluded that IHRA did not violate the plaintiffs' equal protection rights, despite the plaintiffs' contention that in filing a complaint under the Act they had not been guaranteed a full hearing on their claims under either common law, statutory, or administrative causes of action, unlike other plaintiffs who had been guaranteed a hearing.[522]

(d) Miscellaneous statutory cases.—In a miscellany of other statutory interpretation disputes, courts referred to the phrase "new tort." Courts interpreted the "new tort" applications of unfair trade practice statutes,[523] wrongful death statutes,[524] anti-fee-splitting statutes,[525] comparative fault statutes,[526] and no-fault motor vehicle statutes.[527]

2. Novel Questions of Common Law Causes of Action.

(a) Invasion of privacy cases.—In five cases published during the 1980s, courts referred to the phrase "new tort" in deciding issues of tortious invasion of privacy interests. In three cases, the courts utilized the phrase in a historical context, making reference to the judiciary's eventual recognition of the "new tort" of privacy many years after the right to privacy as a separate civil wrong was articulated in the 1890 Warren and Brandeis article.[528] In the other two cases, the courts employed the words "new tort" to characterize analogues to the traditional privacy causes of action.

DeAngelo v. Fortney[529] was one of the latter two cases. In *DeAngelo*, the Pennsylvania Superior Court refused to recognize a separate tort of harassment in a case involving a homeowner who was suing the defendant for having provided the homeowner's name to home improvement companies that later solicited his business.[530] The

520. ILL. ANN. STAT. ch. 68, para. 1-101 to 9-102 (Smith-Hurd 1989).
521. *Lemon*, 625 F. Supp. at 1117-18.
522. *Id.*
523. *See, e.g.*, Doliner v. Brown, 21 Mass. App. 692, 489 N.E.2d 1036 (1986).
524. *See, e.g.*, Weimer v. Hetrick, 309 Md. 536, 525 A.2d 643 (1987).
525. *See, e.g.*, Deutsch v. Health Ins. Plan of Greater New York, 573 F. Supp. 1443 (S.D.N.Y. 1983).
526. *See, e.g.*, Glidden v. German, 360 N.W.2d 716, 721 (Iowa 1984).
527. *See, e.g.*, Jahn v. O'Neil, 327 Pa. Super. 357, 360-61, 475 A.2d 837, 839 (1984).
528. *See* Mendonsa v. Time, Inc., 678 F. Supp. 967, 968 (D.R.I. 1988); McSurely v. McClellan, 753 F.2d 88, 110 (D.C. Cir. 1985).
529. 357 Pa. Super. 127, 515 A.2d 594 (1986).
530. *Id.* at 132, 515 A.2d at 596.

court noted that an action for invasion of privacy should ordinarily provide an adequate remedy for conduct that unreasonably interferes with a person's right to be left alone.[531]

In another vein, the dissent in *Kramer v. Downey*[532] objected to the majority's exercise of judicial activism[533] in a married man's action against a former lover who spied upon him and intruded on his personal life at home and at work. While the majority of the court concluded that the right to privacy included the right to be free of such willful intrusions,[534] the dissent saw the holding as "classic proof of the old aphorism: 'hard facts make bad law,' "[535] because the court was expanding the action of privacy to the extent of creating a new tort.[536]

(b) Intentional infliction of emotional distress cases.—Due largely to citation of Prosser's 1939 article,[537] numerous cases examining the action for intentional infliction of emotional distress or outrage included the phrase "new tort."[538] *Hall v. May Department Stores Co.*[539] involved an action for defamation and intentional infliction of emotional distress that a store employee brought for having been questioned by store security personnel about shortages in a cash register. In an opinion by Justice Linde, the Oregon Supreme Court held for the plaintiff and sustained the jury verdict.[540] Linde's opinion is important, however, for the independent gloss he placed on the cause of action and for the critique of semantical labels that

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531. *Id.*

532. 680 S.W.2d 524 (Tex. Ct. App. 1984).

533. *Id.* at 526 (Storey, J., dissenting).

534. *Id.* at 525.

535. *Id.* at 526.

536. *Id.* (Storey, J., dissenting). The dissent argued that creation of a new tort "should be left to the court of last resort." *Id.* (citations omitted).

537. Prosser, *supra* note 5.

538. *See* Ingram v. Pirelli Cable Corp., 295 Ark. 154, 747 S.W.2d 103, 105 (1988); Growth Properties Inc. v. Cannon, 282 Ark. 472, 669 S.W.2d 447, 448 n.3 (1984); Tandy Corp. v. Bone, 283 Ark. 399, 678 S.W.2d 312, 315 (1984); Moses v. Prudential Ins. Co. of America, 187 Ga. App. 222, 369 S.E.2d 541, 543 (1988); Eddy v. Brown, 715 P.2d 74, 77 (Okla. 1986); Patton v. J.C. Penney Co., 75 Or. App. 638, 707 P.2d 1256, 1260 (1985), *rev'd in part*, 301 Or. 117, 719 P.2d 854 (1986) (Gillette, P.J., concurring in part, dissenting in part) (citing Prosser, *supra* note 5); Ford v. Hutson, 276 S.E.2d 776, 777 (S.C. 1981) (new tort recognized in South Carolina); Save Charleston Foundation v. Murray, 286 S.C. 170, 333 S.E. 2d 60, 66 (S.C. App. 1985); Ruple v. Brooks, 352 N.W.2d 652, 657 (S.D. 1984) (citing Note, *Minnesota's "New Tort": Intentional Infliction of Emotional Distress*, 10 MINN. L. REV. 349 (1984)); Tidelands Auto Club v. Walters, 699 S.W.2d 939, 943 (Tex. Ct. App. 1985) ("new tort" of intentional infliction of emotional distress recognized in Texas); Chamberlaine & Flowers v. Smith Contracting, 341 S.E.2d 414, 417 (W. Va. 1986).

539. 292 Or. 131, 637 P.2d 126 (1982).

540. *Id.* at 142, 637 P.2d at 133.

Prosser and the *Restatement of Torts* had put on the "new tort."[541] Linde wrote that:

> In attempting to articulate what separates actionable conduct from the ordinary run of crudely aggressive, overbearing, or ill-tempered behavior, Prosser and the Restatement turned to adjectives like "outrageous" and "extreme." These are not words of art; other words or phrases could serve as well. All are designed only to express the outer end of some gradation or scale of impropriety and social disapproval. No more can be conveyed by defining one epithet by another . . . . [F]or the purpose of informing a trial court's exercise of its own responsibility . . . the facts of the decided cases probably convey more than any battery of verbal formulas.[542]

Decisions written during the eighties reflect judicial frustration with defining the elements of the tort of intentional infliction of emotional distress and disagreement over the application of those elements to varying fact patterns. For example, the court in *McGrath v. Fahey*,[543] sketched the history of the tort of outrage and found that the plaintiff had stated a cause of action.[544] During its analysis, the *McGrath* court observed that "the main difficulties consist of determining what conduct constitutes 'extreme and outrageous' conduct and what emotional distress may be characterized as 'severe.'"[545]

Judges also disagree about the application of the elements of an intentional infliction of emotional distress claim to the facts of a case. In *Haas v. Freeman*,[546] a construction subcontractor and his wife sued the defendant for having issued a telephoned report that said the sheriff was going to arrest the subcontractor for issuing a bad check to an employee. Holding for the defendant, the Kansas Supreme Court said that the erroneous telephone message did not go beyond the bounds of decency.[547] A dissenting justice, however, believed that there was sufficient evidence to support the finding that the defendant had committed the tort of outrage.[548] Since the jury found the defendant's act to be outrageous, the dissent argued that

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541. *See id.* at 136, 637 P.2d at 129-30 (citing Prosser, *supra* note 5; RESTATEMENT (SECOND) OF TORTS § 46).

542. *Id.* at 135-36, 637 P.2d at 129-30 (citation omitted).

543. 163 Ill. App. 3d 584, 520 N.E.2d 655 (1987).

544. *Id.* at 591, 520 N.E.2d at 658-59.

545. *Id.* at 588, 520 N.E.2d at 658 (citation omitted).

546. 236 Kan. 664, 693 P.2d 1194 (1985).

547. *Id.* at 669, 693 P.2d at 1198 (citing Roberts v. Saylor, 230 Kan. 289, 637 P.2d 1175 (1981)).

548. *Id.* (Lockett, J., concurring in part, dissenting in part; dissenting as to this part).

the reviewing court should not have reweighed the facts or engaged in further judicial lawmaking regarding the elements of a cause of action.[549]

In two cases decided during the 1980s, judges discussed the intricate relationship between the tort of outrage and other parallel tort causes of action. In *Patton v. J.C. Penney Co.*,[550] Justice Linde commented on an employee's suit against his supervisor for wrongful discharge and intentional infliction of emotional distress. While agreeing with the majority opinion that the employee's complaint did not state sufficient facts to constitute the tort of wrongful discharge or outrage, Linde believed that the facts sufficiently supported a claim for tortious interference with plaintiff's employment contract.[551]

The California Court of Appeal opinion in *Flynn v. Highan*[552] involved the question of whether plaintiffs who were constitutionally barred under the first amendment from bringing a defamation action against an author could, nevertheless, continue their action for intentional infliction of emotional distress. The court concluded that allowing the latter claim to proceed would be tantamount to the judicial creation of a new tort action, and held that plaintiffs should not be able "to do indirectly that which they could not do directly" because of the constitutional first amendment privilege.[553]

(c) Negligent infliction of emotional distress cases.—During the 1980s, opinions in thirteen cases used the phrase "new tort" while adjudicating issues involving claims for negligent infliction of emotional distress. Courts used the phrase in cases involving the continued applicability of the physical impact rule;[554] the need for physical injury to recover for emotional distress;[555] the ability of parents to

549. *Id.* at 670-71, 693 P.2d at 1199.

550. 301 Or. 117, 719 P.2d 854 (1986).

551. *Id.* at 126, 719 P.2d at 859 (Linde, J., concurring in part and dissenting in part).

552. 149 Cal. App. 3d 677, 197 Cal. Rptr. 145 (1983).

553. *Id.* at 682, 197 Cal. Rptr. at 148 (citation omitted).

554. *See* Elza v. Liberty Loan Corp., 426 N.E.2d 1302, 1308 (Ind. 1981) (Hunter, J., dissenting) (citing Prosser, *supra* note 5).

555. *See* Fournell v. Usher Pest Control Co., 208 Neb. 684, 305 N.W.2d 605, 611 (1981), *overruled by* James v. Lieb, 221 Neb. 47, 375 N.W.2d 109 (1985) (Krivosha, C.J., dissenting) (disputing majority's requirement of need for bodily harm); Strachan v. John F. Kennedy Memorial Hosp., 209 N.J. Super. 300, 507 A.2d 718 (1986), *rev'd in part*, 109 N.J. 523, 538 A.2d 346 (1988) (physical injury required in action by parent against hospital for negligence in hospital's failure to have in place a procedure for disconnecting, upon request, life support systems for a brain dead patient); Payton v. Abbot Labs, 386 Mass. 540, 437 N.E.2d 171, 177 (1982) (cause of action for emotional distress alleged to have resulted from increased statistical likelihood of daughter of woman using DES would not be recognized absent physical harm) (citing Prosser, *supra* note 5); Air Florida Inc. v. Zondler, 683 S.W.2d

recover as bystanders who witnessed the negligent medical treatment of their child;[556] and, a wife's ability to recover for negligent infliction of emotional distress, although she was not present when her husband was hurt in a fall from his hospital bed.[557]

Five of the decisions involving tort claims for negligent infliction of emotional distress deserve more extended discussion because of the quality of their policy analyses. In the first three cases the plaintiffs' personal safety interests were directly at risk. *Schultz v. Barberton Glass Co.*[558] involved an incident in which a sheet of glass fell off a truck in front of the plaintiff's automobile and shattered his windshield. Although glass fragments lodged in plaintiff's hair, he did not suffer any contemporaneous physical injury.[559] The Ohio Supreme Court broke new ground by holding that a contemporaneous physical injury is unnecessary in an action to recover for negligent infliction of emotional distress.[560] Citing Prosser's *New Tort* article, the *Schultz* court found unpersuasive the argument that eliminating the physical injury requirement would result in an unmanageable "flood of litigation."[561] The court similarly rejected arguments that people would bring fictitious claims and that courts would face insurmountable proof problems because damages would be based upon conjecture or speculation.[562] The court marshalled numerous law review articles in support of eliminating the contemporaneous physical injury requirement and noted that "[e]motional injury can be as severe and debilitating as physical harm and is deserving of redress."[563]

A Missouri case, *Bass v. Nooney Co.*,[564] also involved a direct threat to the plaintiff's physical welfare. Ms. Bass became trapped

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769, 775 (Tex. Ct. App. 1984) (Guillot, J., dissenting) (disputing the need for physical injury) (citing Prosser, *supra* note 5).

556. Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985). *Cf.* Andalon v. Superior Court (Plowman), 162 Cal. App. 3d 600, 208 Cal. Rptr. 899, 903 (1984).

557. Wiggins v. Royale Convalescent Corp., 158 Cal. App. 3d 914, 924 n.7, 206 Cal. Rptr. 2, 8 n.7 (1984) (Sonenshine, J., dissenting) (disputing the need for the "direct victim" concept, *citing* Gallagher, *Molien v. Kaiser Foundation Hospitals: California's New Tort of Negligent Infliction of Serious Emotional Distress*, 18 CAL. W.L. REV. 101 (1982)).

558. 447 N.E.2d 109 (Ohio 1983).

559. *Id.* at 110.

560. *Id.* at 110-11.

561. *Id.* at 111.

562. *Id.*

563. Schultz v. Barberton Glass Co., 447 N.E.2d 109, 113 (Ohio 1983). *Compare* the dissenting opinion which, while agreeing that the contemporaneous physical injury rule needed to be changed, urged that the safeguard of emotional disturbance "manifested as a definite and objective physical injury" replaced the old standard. *Id.* at 115 (Holmes, J., dissenting).

564. 646 S.W.2d 765 (Mo. 1983).

on a stalled elevator for about a half hour; as a result of the incident she complained of dizziness, restlessness, a fainting spell and extreme anxiety. Holding for the plaintiff, the Missouri Supreme Court abolished the contemporaneous physical injury and impact rule.[565] The *Bass* court cited Prosser's *New Tort* article as well as a number of other scholarly articles that criticized the plaintiff's need to establish physical impact in an action for emotional distress.[566] The court found the impact rule unfair because courts tended to liberalize the meaning of "physical impact."[567] The court also rejected the claim that abandoning the impact rule would lead to a flood of fraudulent claims and speculative proof on the ground that through psychiatric tests and diagnostic techniques the existence and severity of psychic harm could be established with reasonable medical certainty.[568] Further, the court believed that it had a duty to provide a forum for the remedy of wrongs.[569]

Quill v. Trans World Airlines[570] also involved a palpable threat to the physical safety of the plaintiff. In *Quill*, a passenger brought an action for negligent infliction of emotional distress for mental damages suffered when TWA's plane dove 34,000 feet in an uncontrolled tailspin. The *Quill* court held that the requirement of "severe emotional distress," a predicate to the recently recognized Minnesota tort of intentional infliction of emotional distress,[571] was not required to make out a cause of action for negligent infliction of emotional distress.[572] The *Quill* court justified the distinction between intentional and negligent theories of emotional distress on three grounds: (1) the supreme court's recognition that the tort of intentional infliction of emotional distress did not displace all other torts involving damages for emotional distress; (2) the evolution of precedent au-

565. *Id.* at 772-73.

566. *Id.* at 769.

567. *Id.*

568. *Id.*

569. Bass v. Nooney Co., 646 S.W.2d 765, 770 (Mo. 1983). *Compare* the dissenting opinion which argued that "[n]othing in the facts of this case either compels or justifies our changing of the law . . . in order to permit this plaintiff a possible recovery." *Id.* at 775 (Welliver, J., dissenting). The dissent went on to predict a "flood of cases . . . to the already overcrowded docket . . .; [exacerbation of the] already oppressively high liability insurance premiums of [the] state" and a further barrier for businesses to locate in the state. The dissent protested "that the time has come for the judiciary to exercise the same fiscal and economic responsibility that we would ask of the other branches of our government." *Id.* (citations omitted).

570. 361 N.W.2d 438 (Minn. Ct. App. 1985).

571. *Id.* at 442.

572. *Id.* at 442-43 (citing Note, *Minnesota's "New Tort": Intentional Infliction of Emotional Distress*, 10 WM. MITCHELL L. REV. 349 (1984)).

thorizing recovery of emotional distress damages when physical symptoms of distress existed; and (3) the zone of danger rule's provision of indicia of genuineness.[573]

In the second group of negligent infliction of emotional distress cases, the plaintiffs seeking recovery for emotional distress experienced a threat to their physical safety. In *Rickey v. Chicago Transit Authority*,[574] an eight-year-old boy witnessed his five-year-old brother being choked by his clothing which had become entangled in an escalator. The accident caused the five-year-old victim to lapse into a coma. The brother who saw the accident brought an action for emotional distress against the operator and manufacturers of the escalator.[575] The Illinois Supreme Court allowed the plaintiff's action to go forward and overruled longstanding precedent that required a bystander to allege and prove contemporaneous physical injury or impact.[576] Citing Prosser's *New Tort* article, the *Rickey* court decided to change existing law because: (1) the majority of jurisdictions did not require contemporaneous physical impact or injury; (2) a slight jolt or jar satisfied the "impact" requirement, making the requirement a pure formality; and (3) a majority of jurisdictions recognized the "zone-of-physical-danger rule" as a suitable safeguard against an onslaught of fraudulent claims.[577]

Likewise, in *Gates v. Richardson*,[578] a six-year-old boy's mother, brother, and sister witnessed an automobile collide with the boy, who was riding a bicycle. In addition to the boy's claim for permanent disability, medical expenses, future lost wages, and pain and suffering, the boy's mother, brother, and sister claimed damages for emotional distress caused by observing the boy being injured.[579] The *Gates* court permitted the mother, brother, and sister's claim for emotional distress to go forward even though they were never in the zone of danger because: (1) compensation for emotional distress was "not a new concept" since courts regularly allowed recovery for emotional harm caused by false imprisonment, malicious prosecution, and work-related stress;[580] (2) the impact rule and the "zone of danger" rule were not necessary predicates to stating a claim for mental

573. *Id.* at 443.
574. 98 Ill. 2d 546, 457 N.E.2d 1 (1983).
575. *Id.* at 549, 457 N.E.2d at 2.
576. *Id.* at 555, 457 N.E.2d at 5.
577. *Id.* at 553-55, 457 N.E.2d at 4-5 (citations omitted).
578. 719 P.2d 193 (Wy. 1986).
579. *Id.* at 194.
580. *Id.* at 194-95.

trauma as held in *Dillon v. Legg*;[581] and, (3) courts cannot apply a precise formula to establish a defendant's duty regarding negligent infliction of emotional distress; courts must weigh policy considerations[582] to decide whether or not plaintiffs are entitled to protection.[583]

(d) Wrongful birth/wrongful life cases.—During the eighties, five state supreme courts utilized "new tort" language while wrestling with policy considerations surrounding wrongful birth and wrongful life causes of action.[584] In *Speck v. Finegold*,[585] the Pennsylvania Supreme Court heard a case involving the birth of a child who suffered from the genetic disease neurofibronatosis. Two separate instances of medical malpractice led to the birth of the child: (1) a urologist failed to perform an adequate vasectomy on the husband, and (2) another physician failed to abort the pregnancy.[586] The court held that the parents could recover from the physicians the expenses attributable to the birth and raising of the child and damages for mental distress, but disallowed the child's claim for wrongful life.[587]

The *Speck* opinion has several noteworthy aspects. First, Justice Flaherty's plurality opinion and Justice Nix's dissent differed jurisprudentially in that Justice Flaherty contended that the parents' tort action for injuries suffered as a result of the negligently performed vasectomy and abortion procedures merely involved the extension of existing principles of tort law,[588] whereas Justice Nix believed that

581. *Id.* at 195 (citing Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)). The Wyoming Supreme Court summarized the holding in Dillon v. Legg: "The [California] court held that a mother, who saw her infant child run down by a negligent motorist, could recover from the motorist for her emotional harm." *Id.*

582. The *Gates* majority outlined eight key policy factors to be considered:

> (1) the foreseeability of harm to the plaintiff, (2) the closeness of the connection between the defendant's conduct and the injury suffered, (3) the degree of certainty that the plaintiff suffered injury, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burdens upon the defendant, (7) the consequences to the community and the court system, and (8) the availability, cost and prevalence of insurance for the risk involved.

Id. at 196 (citing Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 131 Cal. Rptr. 14 (1976)).

583. Gates v. Richardson, 719 P.2d 193, 196 (Wy. 1986) (quoting W. KEETON, PROSSER AND KEETON ON TORTS § 54 at 357-58 (1984)).

584. *See also* Turpin v. Sortinis, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (1981), *rev'd*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Goldberg v. Ruskin, 128 Ill. App. 3d 1029, 471 N.E.2d 530 (1984).

585. 497 Pa. 76, 439 A.2d 110 (1981).

586. *Id.* at 81-82, 439 A.2d at 112.

587. *Id.* at 83, 439 A.2d at 113.

588. *Id.* at 93, 439 A.2d at 113 (Flaherty, J., concurring).

the parents were asking the court to *judicially legislate* two *new* causes of action.[589] Second, like the opinions in other cases in which courts recognized new torts, the *Speck* court emphasized the need to provide redress for every substantial wrong and to hold wrongdoers responsible for the consequences of their misconduct.[590] Third, the plurality opinion and dissent differed in their policy analysis. The plurality justified the wife's wrongful birth action on the basis that she had a constitutional right to seek a termination of pregnancy under certain conditions[591] and that the goals of tort law were to compensate the victim, deter negligence, and encourage due care.[592] The Nix dissent, however, asserted that had the court refused to recognize the wrongful birth action it would not have constituted governmental interference with the constitutional right to abortion.[593]

In *Nelson v. Krusen*,[594] the Texas Supreme Court considered, but ultimately did not recognize, claims for wrongful life and wrongful birth against a physician who allegedly failed to warn parents who had a child born with Duchenne Muscular Dystrophy that the mother was a carrier of the genetic disease.[595] While the majority opinion viewed Texas precedent as having approved a cause of action for wrongful birth,[596] the concurring opinion argued that wrongful birth was not a new tort and involved no more than the traditional elements of a negligence cause of action.[597] The concurrence shared the majority's misgivings about recognizing the "new tort" of wrongful life.[598] Whereas the majority emphasized the public policy of placing a high value on the creation of human life and the difficulty of calculating damages for a wrongful life claim,[599] the concurring opinion was concerned with deciding how to determine the element of injury.[600]

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589. *Id.* at 94, 439 A.2d at 119 (Nix, J., dissenting, original emphasis).

590. Speck v. Finegold, 497 Pa. 76, 83, 439 A.2d 110, 113 (1981) (Flaherty, J., concurring) (citing Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973); Neiderman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970)).

591. *Id.* at 85, 439 A.2d at 114 (citing Roe v. Wade, 410 U.S. 113 (1973)).

592. *Id.* (citations omitted).

593. *Id.* at 97, 439 A.2d at 120 (Nix, J., dissenting).

594. 678 S.W.2d 918 (Tex. 1984).

595. *Id.* at 925.

596. *Id.* at 923.

597. *Id.* at 925. The concurrence agreed with the majority that Texas's two-year statute of limitations on the parents' claim, however named, violated the "open courts" provision of the Texas Constitution.

598. *Id.* at 929 (citing Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140 (1976)).

599. Nelson v. Krusen, 678 S.W.2d 918, 924-25 (Tex. 1984).

600. *Id.* at 929 (Robertson, J., concurring).

Justice Kilgarlin, who wrote a partially dissenting and partially concurring opinion, disputed the majority's decision not to recognize a cause of action for wrongful life.[601] He believed that tort law's social policy of deterring wrongdoing supported the recognition of the parents' action for wrongful life.[602]

In *Smith v. Cote*,[603] the of New Hampshire Supreme Court recognized the parental claim for wrongful birth but rejected the child's claim for wrongful life.[604] The *Smith* case involved a mother's claim for wrongful birth of a child born with Rubella and the child's claim for wrongful life. The *Smith* court asserted that courts should never decide whether a person's life is worthwhile.[605] The court distinguished the case from cases involving the right to die doctrine noting that "the judiciary has an important role to play in protecting the privacy rights of the dying . . . [but] . . . has no business declaring that among the living are people who never should have been born."[606] The court also acknowledged the increasing public awareness that the handicapped are valuable and productive members of society.[607] Accordingly, the *Smith* court concluded that "[t]o characterize the life of a disabled person as an injury would denegrate both this new awareness and the handicapped themselves."[608]

In two recent state supreme court cases employing the phrase "new tort," the judiciary interpreted legislative "tort reform" statutes that preclude wrongful life and wrongful birth actions. In *Hickman v. Group Health Plan, Inc.*,[609] the Minnesota Supreme Court deferred to the legislature in rejecting constitutional due process and equal protection attacks on the statute[610] and in rejecting an argument that the statute violated a state constitutional provision assuring remedies for rights that vested at common law.[611] In Justice Simonett's concurring opinion, he echoed the traditional policy grounds for not recognizing a new tort cause of action, stating that

601. *Id.* at 931-32 (Kilgarlin, J., dissenting).
602. *Id.* at 932.
603. 128 N.H. 231, 513 A.2d 341 (1986).
604. *Id.* at 252-53, 513 A.2d at 355.
605. *Id.* at 248, 513 A.2d at 352.
606. *Id.* at 249, 513 A.2d at 353.
607. *Id.* (citing Comment, *Wrongful Life: A Misconceived Tort*, 15 U.C. DAVIS L. REV. 447, 459-60 (1981)).
608. Smith v. Cote, 128 N.H. 231, 249, 513 A.2d 341, 353 (1986) (quoting Comment, *supra* note 607, at 447, 459-60 (1981)). The court also observed that, in deciding whether to recognize a new tort cause of action, it is appropriate to note that wrongful life claims present problems that cannot be resolved in a fair and even-handed manner. *Id.*
609. 396 N.W.2d 10 (Minn. 1986).
610. MINN. STAT. § 145.424(2) (1984).
611. *Hickman*, 396 N.W.2d at 15.

the legislature, not the judiciary, should create new tort causes of action.[612]

The Missouri Supreme Court in *Wilson v. Kuenzi*[613] held that the state statute precluding wrongful life or wrongful birth actions did not apply retroactively, even though the court precluded such causes of action before the statute went into effect.[614] The court maintained that the legislature's expressed policy of limiting the statute of limitations for malpractice actions and malpractice recoveries, as well as reforming legislative tort law, supported its decision not to recognize the torts of wrongful life or wrongful birth before the effective date of the Missouri legislation.[615]

(e) Product liability cases.—Compared to the previous decade, judicial use of "new tort" language in product liability cases decreased significantly during the 1980s to only two reported decisions. *Cincinnati Gas & Electric Co. v. General Electric Co.*[616] arose from the construction of a nuclear power plant. The utility sued the supplier of the nuclear reactor and the architectural/engineering firm, contending that the plant's containment structure was defective in that it could not contain the radioactive steam that emanated from the reactor. The court concluded that the plaintiff's remedy for economic loss was available under contract law, not tort law.[617] In arriving at that decision, the *Cincinnati* court relied on Dean Prosser's comments on the subject of pecuniary loss.[618]

In *Hovanec v. Harnischfeger Corp.*,[619] the United States Court of Appeals for the Fifth Circuit upheld a third party product liability verdict for a worker injured in an industrial accident. In criticizing the manufacturer's assumption of risk and contributory negligence arguments, the court noted that:

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612. *Id.* at 15 (Simonett, J., concurring specially) (citing MINN. STAT. § 145.424 (1984)). Elsewhere in the concurrence, Justice Simonett observed that "[n]ot every duty owed not to injure people gives rise to a tort suit for money damages." *Id.* at 16 (footnote omitted). In a dissent joined by three members of the court, Justice Mamdahl urged invalidation of the statute as "an unconstitutional restriction on a woman's right to an abortion prior to viability." *Id.* at 20 (Mamdahl, C.J., dissenting).

613. 751 S.W.2d 741 (Mo. 1988).

614. *Id.* at 742.

615. *Id.* at 746 (citations omitted). A dissenting opinion by Justice Higgins emphasized that "[t]here is no necessity whatever that a tort must have a name." *Id.* at 748 (Higgins, J., dissenting) (quoting PROSSER, THE LAW OF TORTS, 3-4 3d ed. 1964)). In a separate dissent, Chief Justice Billings expressed strong opinions on the unconstitutionality of the state legislation. *Id.* at 748-49 (Billings, C.J., dissenting).

616. 656 F. Supp. 49 (S.D. Ohio 1986).

617. *Id.* at 55.

618. *Id.* at 60 (citations omitted).

619. 807 F.2d 448 (5th Cir. 1987).

> Fancy new tort theories have been invented by brilliant academics and crafty lawyers and recognized by great jurists to afford workers and consumers increased protection from the defective products of too often callous manufacturers. The doctrines of assumption of risk and contributory negligence have changed dramatically since Judge Cardozo wrote the landmark opinion in *MacPherson v. Buick Motor Co.*[620]

(f) Abolition of immunity cases.—Like decisions in the 1970s,[621] the eighties opinions cover a wide spectrum of cases using "new tort" parlance in debating whether to abolish or erode old immunity doctrines.[622] The clear focus during the 1980s, however, was on judicial interpretation of immunity defenses by governmental agencies, public officials, and quasi-governmental agencies.[623]

In *Jet Industries, Inc. v. United States*,[624] the United States District Court for the Western District of Texas vehemently defended the federal government's immunity in official actions surrounding the Federal Witness Protection Act.[625] *Jet Industries* involved a complaint that because the government had negligently supervised a federal probationer and participant in the Federal Witness Protection Program, as well as negligently failed to warn the plaintiff of a known risk of fraud from the probationer's past criminal record, the plaintiff corporation lost nearly $1.5 million. In holding the government immune, the court determined that the selection and supervision of participants in the Federal Witness Protection Program constituted a discretionary function, which was excepted from waiver under the Federal Tort Claims Act.[626] The court rejected the argument that government officials had a duty of care to supervise probationers because imposing such a duty would necessitate writing "a new chapter in tort law," which was not within the court's province.[627]

Five state supreme court opinions written during the 1980s also

620. *Id.* at 452-53 (citation omitted).

621. *See supra* notes 363-77 and accompanying text.

622. For decisions of minor importance referring to legislative enactment of relatively "new tort" claims statutes, see Phelps v. Anderson & Langford, 700 F.2d 147, 149 n.2 (4th Cir. 1983); Green v. Commw., 13 Mass. App. 524, 435 N.E.2d 362, 365 (1982).

623. Only one case decided during the decade used "new tort" language to discuss the implications of intrafamily immunity. *See* Pautz v. Cal-Ros, Inc., 340 N.W.2d 338, 340 n.1 (Minn. 1983) (court held that abolition of intrafamily immunity did not create a new cause of action or a new tort).

624. 603 F. Supp. 643 (W.D. Tex. 1984).

625. 18 U.S.C. §§ 3579, 3580 (1988).

626. 603 F. Supp. at 644-45 (citing 28 U.S.C. § 2680 (1982)).

627. *Id.* at 646.

addressed various governmental and quasi-governmental immunity issues while utilizing "new tort" language. Initially, both the Mississippi Supreme Court and the South Carolina Supreme Court judicially abolished the doctrine of sovereign immunity in their states. In *Pruett v. City of Rosedale*,[628] the court emphasized that it was acting to abolish a "judicially created principle of sovereign immunity."[629] The *Pruett* court explained that the business climate changes over the past 200 years, the inequity of blanket immunity to government, the fact that most states had abolished the sovereign immunity doctrine, the governmental immunity's tendency to encourage governmental irresponsibility, the historical anomaly of adopting a doctrine based on the "divine right of kings," and the law's rule of remedying wrongs even if new tort liability is created were all reasons for abolishing sovereign immunity.[630]

In *McCall v. Batson*,[631] the South Carolina Supreme Court echoed the *Pruett* court's reasons for abolishing the sovereign immunity doctrine.[632] The *McCall* court also noted its earlier elimination of state immunity in contract cases, charitable immunity, and the illogical and unfair "patchwork" of sovereign immunity exceptions carved out by the legislature as reasons for judicially abrogating the doctrine.[633]

In the three other state supreme court cases, the dissenting opinions used the phrase "new tort" pejoratively in order to undercut the majority's holding. Justice Bakes of the Idaho Supreme Court employed this tactic in his dissenting opinions in *Sterling v. Bloom*[634] and *Oppenheimer Industry v. Johnson Cattle Co.*[635] In *Sterling*, the court held that under the Idaho Tort Claims Act the discretionary function exception did not bar from evidence a state probation officer's alleged negligence in failing to prevent a probationer from driving while intoxicated.[636] Justice Bakes chastised the majority for making "fundamental tort law changes" and for creating a "new tort" to reach its holding.[637] He raised similar objections in *Oppen-*

628. 421 So. 2d 1046 (Miss. 1982).

629. *Id.* at 1046.

630. *Id.* at 1046-51. In abolishing the doctrine, however, the court specifically retained the immunity of "legislative, judicial and executive acts by individuals acting in their official capacity." *Id.* at 1052. The court also made government liability prospective only. *Id.*

631. 285 S.C. 243, 329 S.E.2d 741 (1985).

632. *Id.* at 245-46, 329 S.E.2d at 742. *See supra* notes 629-30 and accompanying text.

633. 285 S.C. at 245, 329 S.E.2d at 742.

634. 111 Idaho 211, 723 P.2d 755 (1986).

635. 112 Idaho 423, 732 P.2d 661 (1986).

636. 111 Idaho at 232, 723 P.2d at 776. *See also* IDAHO CODE § 6-904(1) (1990).

637. 111 Idaho at 251, 723 P.2d at 795 (Bakes, J., dissenting). A concurring opinion

heimer when the majority held the State Brand Board not immune from tort liability under the "discretionary function exception" to the state tort claims act.[638]

In *Weinberg v. Dinger*,[639] Justice Garibaldi of the New Jersey Supreme Court criticized the majority for abrogating a private water company's common law immunity from liability for negligently failing to provide sufficient water pressure to fire hydrants.[640] Garibaldi said that the "new tort liability" judicially foisted on private water companies constituted a policy change that the legislature should have made based on information and forecasts supplied by the Public Utilities Commission.[641]

(g) Loss of consortium cases.—Three cases decided during the 1980s addressed loss of consortium claims while utilizing "new tort" language. The most notable opinion was by Justice Linde in *Norwest v. Presbyterian Intercommunity Hospital*.[642] In that case, the Oregon Supreme Court denied a child's claim for loss of parental consortium.[643] Justice Linde articulated a number of important tort principles in the course of the *Norwest* opinion. First, Linde observed that new tort problems "pose recurring questions of the sources and methods of law."[644] Second, Linde said that because social policy considerations are indeterminate, the court should ignore the pragmatic arguments advanced for and against a child's damage action for loss of consortium.[645] Third, Linde's opinion reviewed claims similar to the plaintiff's loss of consortium claim, including: (1) loss of spousal consortium; (2) parents' recovery for negligent injuries to minor children; (3) the child's noneconomic loss for his parents' wrongful death; (4) alienation of affections, and (5) bystanders actions for emotional distress from witnessing the death or injury of a close relative.[646] Finding none of these analogies persuasive under Oregon law, the court concluded that they could not be "cumulated

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attempted to answer the negative reference of the dissent by arguing that: "Clearly, the majority has not created a new tort out of the Idaho Act, but merely made the state liable for the same torts as are private persons and entities. The dissent's characterization of what the majority has said on this point is therefore erroneous." *Id.* at 241, 723 N.E.2d at 785 (Huntley, J., concurring).

638. 112 Idaho at 428-29, 732 P.2d at 666-67.
639. 106 N.J. 469, 524 A.2d 366 (1987).
640. *Id.* at 498, 524 A.2d at 386 (Garibaldi, J., dissenting).
641. *Id.* at 499, 524 A.2d at 381.
642. 293 Or. 543, 652 P.2d 318 (1982).
643. *Id.* at 688-89, 652 P.2d at 332-33.
644. *Id.* at 545, 652 P.2d at 319.
645. *Id.* at 553, 652 P.2d at 324.
646. *Id.* at 554, 652 P.2d at 324.

to support a general liability toward dependent children for negligent injury to their parents."[647]

The Supreme Court of Colorado also denied an action for loss of parental consortium in *Lee v. Colorado Department of Health*.[648] The *Lee* court focused on the inherent difficulty the judiciary faces in weighing competing social policy considerations outside the pre-existing conceptual framework of tort law.[649] The court held that the legislature should weigh these factors to decide whether a child had a valid claim for the loss of companionship and support of an injured parent.[650]

(h) Wrongful discharge cases.—During the 1980s the judiciary issued opinions employing the phrase "new tort" in twenty wrongful discharge cases, but only five cases deserve elaboration.[651]

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647. Norwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 569, 652 P.2d 318, 333 (1982). Justice Lent, in a dissenting opinion, concluded that he "would hold plaintiff has pleaded a claim under the ordinary principles of liability for injury foreseeably resulting from defendant's negligence." *Id.* at 574, 652 P.2d at 335 (Lent, J., dissenting).

648. 718 P.2d 221 (Colo. 1986).

649. The court noted that:

> The question of whether a child should be permitted to recover monetary damages for the loss of parental companionship and support stemming from a negligently inflicted injury to a parent involves a consideration of such factors as the efficacy of monetary compensation as a substitute for the companionship and guidance of a parent, the intangible character of the loss, the difficulty of measuring damages to offset the loss, the individual and *societal costs necessarily resulting from recognition of this new tort*, and the risk of overlapping and multiple awards for the different interests of children and spouse adversely affected by the parent's injury.

Id. at 233-34 (emphasis added).

650. *Id.* at 234.

651. *See also* Lamb v. Briggs Mfg., 700 F.2d 1092, 1095-96 (7th Cir. 1983) (under Illinois law, employee could not assert a claim for the new tort of retaliatory discharge when employee was a party to a collective bargaining agreement which provided a "just cause" guarantee and arbitration remedies); McCann v. Frank B. Hall & Co., 109 F.R.D. 363, 365-66 (N.D. Ill. 1986) (recent case law did not provide sufficient excuse for 30-month delay in former employee's request to amend pleading to include allegations for retaliatory discharge and willful and wanton misconduct); Moffett v. Gene B. Glick Co., 621 F. Supp. 244, 285-86 (N.D. Ind. 1985) (trial court made findings of fact and law after a bench trial that employee established violations of Indiana law concerning intentional infliction of emotional distress and wrongful discharge); Kavanagh v. KLM Royal Dutch Airlines, 566 F. Supp. 242, 244-45 (N.D. Ill. 1983) (discharge of at-will employee who had retained an attorney to represent him in a dispute with his employer concerning payment of wages did not violate public policy of Illinois according to the "contours of the new tort" fashioned under state law); Carrillo v. Illinois Bell Tel. Co., 538 F. Supp. 793, 799 (N.D. Ill. 1982) (court refused to exercise pendent jurisdiction over state claim due to uncertainty as to whether Illinois courts would apply "relatively new tort" of retaliatory discharge to allegedly discriminatory discharges); Fleming v. Pima County, 141 Ariz. 167, 685 P.2d 1319, 1322 (Ariz. Ct. App. 1983) (employee of county highway department was not at-will employee, as county could only discharge him for cause or by bona fide layoff; thus, after employee was laid off, employee had a contract claim, not a new tort claim for wrongful discharge); Crenshaw v. DeVry, Inc., 172 Ill. App. 3d 228, 526 N.E.2d 474, 476 (1988) ("relatively new tort" of retaliatory discharge not applicable to em-

In *Palmateer v. International Harvester Co.*,[652] the Illinois Supreme Court held that an employee who had been fired from a managerial position for telling a local law enforcement agency that an International Harvester employee might be violating the state criminal code and for agreeing to testify against the coworker in a future criminal trial, had stated a cause of action for retaliatory discharge.[653] The majority in *Palmateer* noted that with the rise of large corporations and the consequent change in employer-employee relations, the mutuality theory, which operates under the belief that employees are on an equal footing with their employers,[654] was no longer realistic.[655] The *Palmateer* court concluded that a clear public policy favoring investigation and prosecution of criminal offenses made the tort of retaliatory discharge a viable action.[656]

In *Holien v. Sears, Roebuck & Co.*,[657] the Oregon Supreme Court held that the discharge of an employee following her resis-

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ployer who terminated employee several weeks after employee gave notice of intent to leave employment); Morton v. Hartigan, 145 Ill. App. 3d 417, 495 N.E.2d 1159, 1161-62 (1986) (complaint failed to state cause of action for the "relatively new tort" of retaliatory discharge for making "proposed legislative and judicial initiatives" to state attorney general); Powers v. Delnor Hosp., 135 Ill. App. 3d 317, 481 N.E.2d 968, 971 (1985) (proposed cause of action for wrongful discharge in cases where an employer states a reason for termination of an employee known by employer to be false, whether grounded in contract or tort, would not be recognized); Darnell v. Impact Indus., Inc., 119 Ill. App. 3d 763, 457 N.E.2d 125, 127 (1983) (evidence on issue of the "relatively new tort of retaliatory discharge" presented a jury question); Cain v. Kansas Corp. Comm'n., 9 Kan. App. 2d 100, 673 P.2d 451, 454 (1983) (complaint based on recently recognized "new tort" of retaliatory discharge, which alleged that employee was terminated by state agency for his outspoken advocacy for consumers and investors, failed to state a claim for retaliatory discharge); Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212 (1985) (former employee's discharge for refusing to submit to polygraph examination violated clear mandate of statute and evidence was insufficient to establish that some of the employees suffered extreme emotional distress necessary to support award for intentional infliction of emotional distress); Freidrichs v. Western Nat'l Mut. Ins. Co., 410 N.W.2d 62 (Minn. Ct. App. 1987) (allegations of at-will employee that he was discharged based on his refusal to violate engineering standards law stated cause of action under public policy exception to at-will doctrine); Dare v. Montana Petroleum Mktg. Co., 687 P.2d 1015 (Mont. 1984) (when parties related widely divergent versions of employee's work performance and reasons for her termination, genuine issues of material fact regarding employee's wrongful discharge claim remained, and summary judgment was inappropriate); Hillesland v. Federal Land Bank Ass'n of Grand Forks, 407 N.W.2d 206, 210 n.1 (N.D. 1987) (it would be inappropriate to provide a common law "new tort" wrongful discharge action for violation of the Farm Credit Act); and Johnson v. Kolman, 412 N.W.2d 109 (S.D. 1987) (former employee's action for wrongful termination and other causes of action not barred by failure to exhaust administrative remedies over objection of dissent that majority "has entered into the creation of new torts" despite contrary statutory directive).

652. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

653. *Id.* at 134, 421 N.E.2d at 880.

654. *Id.* at 129, 421 N.E.2d at 878.

655. *Id.* (citing Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967)).

656. *Palmateer*, 85 Ill. 2d at 133, 421 N.E.2d at 880.

657. 298 Or. 76, 689 P.2d 1292 (1984).

tance to sexual harassment by her supervisor was an actionable tort despite the defendant's contention that the legislature had abrogated any common law remedy for wrongful discharge.[658] In a concurring opinion, Justice Linde explained that the court had sharpened the standard for alleging the tort of retaliatory discharge by recognizing it only when an employee's discharge was the result of either fulfilling a societal obligation or pursuing a legal right directly related to his status as an employee, unless the legislature intended another remedy to be sufficient to protect the discharged employee."[659]

In *Hartley v. Ocean Reef Club, Inc.*,[660] a Florida District Court of Appeal held that an at-will employee who lost his job for allegedly refusing to participate in his employer's violation of environmental statutes and regulations failed to state a cause of action for wrongful discharge.[661] Acknowledging that several jurisdictions had created a tort cause of action for wrongful discharge on the basis of "public policy,"[662] the court noted that Florida courts have refused to adopt this "new tort theory."[663] The *Hartley* court concluded that only the legislature should create a new cause of action for retaliatory or wrongful discharge because an action for retaliatory discharge: (1) would abrogate the inherent right of contract between employer and employee; (2) would overrule Florida precedent and create uncertainty in the law governing employer-employee relations, and (3) cannot justifiably be created by the judiciary given the vague concepts underlying it.[664] Also, the court observed that the legislature should determine the public policy, not the courts.[665]

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658. *Id.* at 97, 689 P.2d at 1304.

659. *Id.* at 100, 689 P.2d at 1305-06 (Linde, J., concurring).

660. 476 So. 2d 1327 (Fla. Dist. Ct. App. 1985).

661. *Id.* at 1328.

662. *Id.*

663. *Id.* at 1329 (citations omitted).

664. *Id.*

665. Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327, 1329 (Fla. Dist. Ct. App. 1985) (citations omitted). As further support for deferring to the legislature, the court noted:

> The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability. Standards should doubtless be established applicable to the multifarious types of employment and the various circumstances of discharge. If the rule of non-liability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.

Id. at 1329-30.

In *Hartford Fire Insurance Co. v. Karavan Enterprise, Inc.*,[666] the United States District Court for the Northern District of California examined "new tort" and contract theories of wrongful discharge under California law in construing a general liability insurance policy.[667] The court found that an intentional discharge was not an unintended or unexpected happening under the policy so that the insurer did not have to defend the insured in the insured's suit for wrongful discharge.[668]

In *Palmer v. Brown*,[669] the Kansas Supreme Court expressly recognized the "new tort" of retaliatory discharge for employees who lost their jobs for having reported infractions of rules, regulations, and the law pertaining to public health, safety, and the general welfare.[670] In *Palmer*, an experienced medical technician brought suit after her employer, a professional corporation of physicians, fired her for reporting instances of Medicaid fraud. Based on state and federal statutory provisions making Medicaid fraud a felony, the court determined that public policy supported a cause of action for retaliatory discharge.[671]

(i) Minority shareholder cases.—Only two judicial opinions given during the 1980s referred to the phrase "new tort" in resolving minority shareholder lawsuits against majority shareholders. In *Coleman v. Taub*,[672] the United States Court of Appeals for the Third Circuit cited the Borden *Old Tort/New Tort* article[673] while interpreting Delaware law as following an "intermediate position" in protecting minority shareholders' rights.[674] The court found Delaware's approach to be between the approach that gives minority shareholders a vested right in corporate participation upon merger and the approach that gives majority shareholders the right to freeze out the minority leaving minority shareholders with appraisal as their sole remedy.[675]

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666. 659 F. Supp. 1077 (N.D. Cal. 1987).

667. The district court observed that "under California law a wrongful discharge can give rise to damages in both contract and tort." The court also observed that there are "three analytically distinct causes of action arising out of the act of discharge: 'breach of employment contract,' 'tortious discharge, and 'bad faith discharge.' " *Id.* at 1079 (citing Koehrer v. Superior Court, 181 Cal. App. 3d 1155, 226 Cal. Rptr. 820 (1986)).

668. *Karavan*, 659 F. Supp. at 1081.

669. 242 Kan. 893, 752 P.2d 685 (1988).

670. *Id.* at 900, 752 P.2d at 689.

671. *Id.* at 899-900, 752 P.2d at 689-90.

672. 638 F.2d 628 (3d Cir. 1981).

673. *Id.* at 634. *See* Borden, *supra* note 400.

674. *Id.* at 635.

675. *Id.* at 634 (citing Borden, *supra* note 400).

Interpreting a similar provision under Pennsylvania law, the Third Circuit, in *Dower v. Mosser Industries, Inc.*,[676] cited the Borden *Old Tort/New Tort* article for the proposition that majority shareholders owed minority shareholders certain fiduciary duties in effecting mergers.[677] Mergers intended solely to "freezeout" or "cash out" minority equity holders from their positions may be enjoined as an attempted breach of fiduciary duty.[678]

(j) Insurance tort cases.—During the eighties the number and variety of judicial opinions utilizing "new tort" parlance to resolve tort cases against insurance companies increased to twenty-three cases. Of these cases, seven merit discussion.[679]

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676. 648 F.2d 183 (3d Cir. 1981).

677. *Id.* at 188-89, 189 n.7.

678. *Id.* at 188-89 (citing Borden, *supra* note 400) (other citations omitted).

679. *See also* A.W. Huss Co. v. Continental Casualty Co., 735 F.2d 246 (7th Cir. 1984) (under Wisconsin law, insured had no cause of action for bad faith handling of a third-party claim within insured's policy coverage despite claim that insurer's delays caused concern, anxiety, business loss, and attorney's fees in monitoring insurer's activities); Intel Corp. v. Hartford Acc. & Indem. Co., 692 F. Supp. 1171, 1179 n.7 (N.D. Cal. 1988) (reasoning by analogy to Oregon precedent on new tort of bad faith denial of existence of a contract); Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050 (Ala. 1987) (evidence that health insurer denied claim, disputing reasonable necessity of insured's hospitalization, without benefit of critical sections of medical file was sufficient to sustain finding of bad faith refusal to pay claim); Aetna Casualty & Sur. v. Broadway Arms, 281 Ark. 128, 664 S.W.2d 463 (1984) (insurer bad faith may give rise to new tort; partial dissent would characterize new tort as "outrage"); Multiplex Ins. Agency v. Cal. Life Ins. Co., 189 Cal. App. 3d 925, 235 Cal. Rptr. 12 (1987) (jury was improperly allowed to determine that tort liability had been established in contract dispute between insurance company and agency, by mere breach of covenant of good faith and fair dealing without determining if any special relationship existed between parties or if insurance company denied contractual liability in bad faith and without probable cause); Federal Kemper Ins. Co. v. Hornback, 711 S.W.2d 844 (Ky. 1986) (homeowner's fire insurer was not a fiduciary as to sum owed insured under policy and breach of contract by insurer does not give rise to a new tort bad faith action authorizing recovery for punitive damages); Pillsbury Co. v. National Fire Ins., 425 N.W.2d 244 (Minn. Ct. App. 1988) (bad faith denial of insurance claim did not constitute new independent tort absent exceptional circumstances); Kubiak v. Allstate Ins. Co., 198 N.J. Super. 115, 486 A.2d 879 (N.J. Super. A.D. 1984) (insurer of personal injury protection benefits not liable for new tort action of punitive damages for breach of obligation to pay benefits in light of system of sanctions under statute); Milcarek v. Nationwide Ins. Co., 190 N.J. Super. 358, 463 A.2d 950 (N.J. Super. A.D. 1983) (personal injury protection insurer's statutory violation did not entitle injured automobile passenger to maintain new theory of recovery for punitive damages in light of sanctions under statute); Reeves v. National Hydraulics Co., 53 Or. App. 639, 632 P.2d 1306 (1981) (trial court was correct in denying the insurer's motion to strike claim for breach of a "fiduciary duty"); Smith v. Harleysville Ins. Co., 495 Pa. 515, 431 A.2d 974, 975 (1981) (court refused to create "new tort" cause of action for insurer bad faith conduct, quoting Kircher, *Insurer's Mistaken Judgment — A New Tort?*, 59 MARQ. L. REV. 775, 786 (1976)); Pekular v. Eich, 355 Pa. Super. 276, 513 A.2d 427 (1986) (a common law action for fraud and deceit is not barred by statutory provisions forbidding any insurer in state from engaging in unfair or deceptive trade practices); Rodgers v. Nationwide Mut. Ins. Co., 344 Pa. Super. 311, 496 A.2d 811 (1985) (insureds could not bring new tort action to obtain damages based upon allegations of insurer's bad faith conduct in failing to defend insureds in light of adequate statutory scheme of sanctions); Myers v. USAA Casualty Ins. Co., 298 Pa. Super. 366, 444 A.2d 1217 (1982) (injured driver and

In *Chavers v. National Security Fire & Casualty Co.*,[680] the Alabama Supreme Court first recognized the intentional tort of bad faith in first party insurance actions.[681] The court held that the tort arises if an insurance company initially refuses to settle a direct claim when the insurance company knows it has no lawful basis for the refusal or has intentionally failed to determine whether it has a lawful basis for such refusal.[682] Accordingly, the *Chavers* court concluded that insureds under a fire insurance policy had stated a cause of action for the tort of bad faith in first party insurance actions even though the insurer had some evidence that the insureds caused the fire.[683] The court found that the evidence linking the insureds to the fire was extremely remote and inadmissible.[684] In a dissenting opinion, Justice Almon criticized the majority for being too anxious to create a new tort without the proper set of facts.[685]

In *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co.*,[686] the Pennsylvania Supreme Court refused to create an independent tort for an insurance company's bad faith conduct in failing to settle a first party property claim for storm damage to a motorboat.[687] Referring to pre-existing statutory law that established fifteen "unfair claim settlement or compromise practices,"[688] the court found that the system of sanctions established under the Unfair Insurance Practices Act[689] did not have to be supplemented by a judicially created cause of action.[690] Dissenting Justice Larsen argued that traditional contract remedies were inadequate and that a tort action would assure a policyholder with limited resources the chance for recovery on small contract claims, and deter the insur-

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passengers could not maintain new tort punitive damages action for acting willfully, intentionally, wantonly and recklessly in handling their claims under No Fault Motor Vehicle Insurance Act); Nazer v. Safeguard Mut. Assur. Co., 293 Pa. Super. 385, 439 A.2d 165 (1981) (complaint did not state a cause of action under the Uniform Insurance Practices Act since there is no private right of action under the Act); Bartlett v. Nationwide Mut. Fire Ins. Co., 290 S.C. 154, 348 S.E.2d 530 (S.C. Ct. App. 1986) (claim for bad-faith refusal to pay first party benefits under insurance policy is a remedy for the violation of rights arising in contract, not a new substantive right in tort, and may be pleaded and proved only as a contract action and not a tort action).

680. 405 So. 2d 1 (Ala. 1981).
681. *Id.* at 6.
682. *Id.* at 7.
683. *Id.*
684. *Id.* at 8-9.
685. Chavers v. National Sec. Fire & Casualty Co., 405 So. 2d 1, 14 (Ala. 1981).
686. 494 Pa. 501, 431 A.2d 966 (1981).
687. *Id.* at 510, 431 A.2d at 972.
688. *Id.* at 506, 431 A.2d at 969.
689. PA. STAT. ANN. tit. 40, §§ 1171.1-.15 (Purdon Supp. 1990).
690. *Id.* at 507, 431 A.2d at 970 (quoting Kircher, *Insurer's Mistaken Judgment — A New Tort?*, 59 MARQ. L. REV. 755, 786 (1986)).

ance company from acting in bad faith.[691] Justice Larsen also believed that a policyholder should be compensated for mental distress suffered as a result of the insurance company's bad faith conduct since people purchase insurance to provide peace of mind.[692]

In *Long v. McAllister*,[693] the Iowa Supreme Court declined to recognize a new tort permitting a third party to recover against a tortfeasor's liability insurer for the insured's alleged bad faith toward the third party in failing to settle a separate claim.[694] The unanimous court distinguished the case from third party excess judgment cases and first party actions in which the duty of good faith and fair dealing arises from the insurance contract and runs from the insurer to the insured.[695] Moreover, the *Long* court reasoned that it could not recognize a duty of the insurer to the victim under general tort concepts since the insurer's fiduciary duty runs to the insured whereas an adversary relationship exists with the victim.[696]

The Alabama Supreme Court faced another bad faith insurance case in *Aetna Life Insurance Co. v. Lavoie*.[697] In *Lavoie*, the plaintiff charged a health insurer with bad faith refusal to pay a medical expense claim. The plaintiff's group health insurer failed to review the plaintiff's claim for hospitalization expenses as required by its own rules and procedures, and failed to obtain hospital progress records or progress notes in deciding whether to deny the claim.[698] The court concluded that the insurer was guilty of fraud, bad faith, and unfair dealing.[699] Dissenting Justice Torbert advocated expanding the damage rules in contract rather than creating a new tort because: (1) contract duties are consensual; (2) established rules govern the determination of a breach of contract; (3) contract law upholds parties' expectancy interests, which is vital in the insurance field since calculating premiums requires predictability; and (4) courts have greater control over excessive jury awards in contract cases than in tort cases.[700]

In 1986, the United States District Court for the Eastern District of Pennsylvania, in *Rich Maid Kitchens v. Pennsylvania Lum-*

691. D'Ambrosia v. Pennsylvania Nat'l Mut. Caualty Ins. Co., 494 Pa. 501, 512, 431 A.2d 966, 972 (1981) (Larsen, J., dissenting).
692. *Id.* at 972-73.
693. 319 N.W.2d 256 (Iowa 1982).
694. *Id.* at 262.
695. *Id.* at 261.
696. *Id.* at 262.
697. 470 So. 2d 1060 (Ala. 1984).
698. *Id.* at 1066.
699. *Id.* at 1070.
700. *Id.* at 1079 (Torbert, J., dissenting).

bermens Mutual Insurance Co.,[701] interpreted the decision in *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co.*[702] The plaintiff in *Rich Maid Kitchens* sought punitive damages from its fire insurer under the traditional tort theories of misrepresentation, fraud, and tortious interference with business relations.[703] The district court concluded that *D'Ambrosio* prevented a plaintiff from recovering punitive damages for outrageous conduct arising from the tort action.[704]

The Idaho Supreme Court, in *White v. Unigard Mutual Insurance Co.*,[705] held that since insurers have a duty to settle first party insurance claims in good faith, an insured has a cause of action against his insurer for bad faith settling of such claims.[706] Concurring in part and dissenting in part, Justice Bakes believed the court should not have created the new tort because Idaho provides a remedy under contract law for egregious conduct on the part of an insurance company.[707]

The United States District Court for the District of New Jersey, in *DiSalvatore v. Aetna Casualty & Surety Co.*,[708] predicted that the New Jersey Supreme Court would recognize a cause of action for breach of an insurer's duty of good faith and fair dealing when the insurer failed to pay benefits due under a homeowner's insurance contract.[709] The district court relied on New Jersey case law, which recognized that insurance companies have greater bargaining power than the insured, and considered insurance policies to be contracts of adhesion.[710] The *DiSalvatore* court believed that the tort of breach of an insurer's duty of good faith and fair dealing would deter insurance companies from wrongfully delaying or denying payment since the tort permitted a plaintiff to recover an amount greater than the contract price.[711]

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701. 641 F. Supp. 297 (E.D. Pa. 1986).

702. 494 Pa. 501, 43 A.2d 966 (1981). *See supra* notes 686-92 and accompanying text.

703. *Rich Maid Kitchens*, 641 F. Supp. at 310.

704. *Id.* at 311 (citations omitted).

705. 112 Idaho 94, 730 P.2d 1014 (1986).

706. *Id.* at 100, 730 P.2d at 1020.

707. *Id.* at 103, 730 P.2d at 1022 (Bakes, J., concurring in part, dissenting in part; dissenting as to this part). *See also id.* at 1023 ("the plaintiff's contract remedies are adequate and there is no reason for this court to create another new tort").

708. 624 F. Supp. 541 (D.N.J. 1986).

709. *Id.* at 543.

710. *Id.* (citations omitted).

711. *Id.* (citing Note, *The Availability of Excess Damages for Wrongful Refusal to Honor First Party Insurance Claims — An Emerging Trend*, 45 FORDHAM L. REV. 164 (1976)).

(k) Noninsurance bad faith tort cases.—Courts in nine cases decided during the 1980s employed "new tort" language in analyzing claims for independent bad faith actions against business defendants in contexts unrelated to the insurer-insured relationship. Courts for the most part refused to extend the tort of bad faith breach of contract beyond the special relationship involved in an insurance agreement. For example, a federal court in Alabama held that plaintiffs could not recover in tort from a bank under a theory of bad faith for the bank's alleged intentional and malicious refusal to close a loan commitment.[712] The Nevada Supreme Court held that a cause of action for tortious breach of an implied covenant of good faith and fair dealing did not extend to the landlord-tenant relationship in commercial leases since the parties were not bound by any special element of reliance or fiduciary duties.[713] The California Court of Appeal found to be prejudicially erroneous jury instructions which stated that a contracting party who failed to deal fairly and in good faith was subject to liability for all damages proximately resulting from such conduct.[714] The Pennsylvania Superior Court refused to recognize a "new tort" arising from alleged breach of contract with bad faith intent to drive another contracting party out of business.[715] A federal court in California found that the new tort for bad faith denial of the existence of a contract was different from denial

712. Brown-Marx Associates, Ltd. v. Emigrant Sav. Bank, 527 F. Supp. 277 (N.D. Ala. 1981) (interpreting Alabama law):

> There is no indication that the Supreme Court of Alabama has given any consideration to the implications of applying this tort to contracts in general. Would it be applicable to someone who fails to pay his grocery bill or rent? Would it be applicable to the maker of a note? Where would the line be drawn if the tort is not restricted to insurance contracts?

Id. at 283.

713. Aluevich v. Harrah's, 99 Nev. 215, 660 P.2d 986 (1983) (citing Comment, *The New Tort of Bad Faith Breach of Contract: Christian v. American Home Assurance Corp.*, 13 TULSA L.J. 605, 613-16 (1977-78)). The dissent, however, argued that "[a]lthough many of the cases which recognize an implied covenant of good faith and fair dealing involve insurance and franchise contracts, I see no reason to restrict actions arising therefrom to these kinds of contracts." *Aluevich*, 99 Nev. at 220, 660 P.2d at 988 (Springer, J., dissenting) (citation omitted).

714. Quigley v. Pet., Inc., 162 Cal. App. 3d 877, 208 Cal. Rptr. 394 (1984). ("Contract, compensatory, and punitive damages were sought for wrongful conduct arising out of a written contract providing for Quigley Bros. to haul raw walnuts on behalf of Pet."). *Id.* at 395.

715. Standard Pipeline Coating Co. v. Solomon & Teslovich, Inc., 344 Pa. Super. 367, 375, 496 A.2d 840, 843-44 (1985). The court observed:

> The new tort theory proposed by Standard is easily differentiated from the established cause of action for intentional interference with the performance of a contract. The latter occurs when one intentionally interferes with the performance of a contract (other than a marriage contract) between another and a third party by inducing or otherwise causing the third party not to perform the contract.

Id. at 844 n.2 (citing RESTATEMENT (SECOND) OF TORTS, § 766 (1977)).

of liability under a contract and separate from the tort of breach of the covenant of good faith and fair dealing.[716] Finally, the California Court of Appeal held that since an independent rental equipment dealer did not have a special relationship with a national rental company, he could not recover from the latter for breach of the covenant of good faith and fair dealing.[717]

In two cases, however, courts utilized the phrase "new tort" to facilitate extending the tort of bad faith breach of contract beyond insurance transactions. In *Forty Exchange Co. v. Cohen*,[718] a New York trial court held that the beneficiary of a lease contract may maintain an action for bad faith breach of contract.[719] Likewise, in *Rozeboom v. Northwestern Bell Telephone Co.*,[720] the South Dakota Supreme Court analogized a limitation of liability clause in a contract for a Yellow Pages listing to a "new tort" of "unconscionability" and held the contract unenforceable as a contract of adhesion.[721]

(l) Intentional spoliation of evidence cases.—A unique category of tort cases that emerged during the 1980s was intentional destruction or spoliation of evidence. A California intermediate appellate court was the first to recognize the cause of action in the 1984 case, *Smith v. Superior Court*.[722] *Smith* involved a personal injury suit arising from an automobile accident. After the accident, the plaintiff's vehicle was towed to the dealership from where it was originally purchased. At plaintiff counsel's request, representatives of the dealership agreed to maintain certain auto parts involved in the accident pending further investigation and repair of the vehicle.[723] The dealer, however, destroyed the evidence of the auto parts.[724]

In recognizing a cause of action for intentional spoliation of evidence, the *Smith* court cited Prosser's tort treatise and recent Cali-

716. Elxsi v. Kukje America Corp., 672 F. Supp. 1294, 1298-99 (N.D. Cal. 1987) (interpreting California law).

717. Martin v. U-Haul Co. of Fresno, 204 Cal. App. 3d 396, 251 Cal. Rptr. 17, 25-28 (1988).

718. 125 Misc. 2d 475, 479 N.Y.S.2d 628 (N.Y. Civ. Ct. 1984).

719. *Id.* at 493, 479 N.Y.S.2d at 632, 639-40 (*citing* Diamond, *The Tort of Bad Faith Breach of Contract: When, If at All, Should it be Extended Beyond Insurance Transactions?*, 64 MARQ. L. REV. 425 (1981)). However, the trial court held that, in the case at bar, breach of the covenant was privileged and liability for the "new tort" was not appropriate. *Id.* at 493, 479 N.Y.S.2d at 640.

720. 358 N.W.2d 241 (S.D. 1984).

721. *Id.* at 246-47 (citing King, *The Tort of Unconscionability: A New Tort for New Times*, 23 ST. LOUIS U.L.J. 97 (1979)). *See also* Wells, *The Doctrine of Unconscionability: A Sword as Well as a Shield*, 29 BAYLOR L. REV. 309 (1977)).

722. 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984).

723. *Id.* at 494, 198 Cal. Rptr. at 832.

724. *Id.* at 496, 198 Cal. Rptr. at 831.

fornia decisions creating actions for "wrongful birth" and "wrongful life" to support its creation of new torts.[725] Additional factors considered by the court included: (1) the state supreme court's recognition of an analogous tort of negligent failure to preserve evidence for prospective civil litigation;[726] (2) the need to deter acts involving destruction of evidence;[727] (3) the law's desire to provide a remedy when someone has suffered a wrong, even when damages cannot be proved with certainty;[728] and (4) the analogy between an action for intentional spoliation of evidence and the "recognized tort" of intentional interference with prospective business advantage.[729]

In *Spano v. McAvoy*,[730] the United States District Court for the Northern District of New York confronted the claim that the destruction of tape recordings of radio communications between a sheriff's deputy and the control center intentionally deprived the plaintiff of evidence needed in a wrongful death action. The decedent's death resulted from a high-speed chase involving the deputy. The plaintiff claimed that, since the destruction of the evidence gave rise to a colorable action, he had been deprived of his fourteenth amendment due process liberty and property rights.[731] The *Spano* court rejected this argument, observing that the interest at stake was not constitutionally protected.[732]

The Arizona Supreme Court, in the 1986 decision *LaRaia v. Superior Court*,[733] held that an apartment tenant failed to state a cause of action against her landlord for intentional spoliation of evidence.[734] The suit in *LaRaia* arose because the plaintiff was poisoned by a pesticide used to spray her apartment. The *LaRaia* court refused to allow the plaintiff to amend her complaint to allege a cause of action based on the landlord's intentional destruction of a pesti-

725. *Id.* at 496, 198 Cal. Rptr. at 832 (citing W. PROSSER, TORTS § 1 at 3-4 (4th ed. 1971); Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (wrongful birth); Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982)).

726. *Id.* at 496-97, 198 Cal. Rptr. at 832-33 (discussing Williams v. California, 64 Cal. 3d 18, 664 P.2d 137, 192 Cal. Rptr. 233 (1983)).

727. Smith v. Superior Court, 151 Cal. App. 3d 491, 499, 198 Cal. Rptr. 829, 833-35 (1984).

728. *Id.* at 501, 198 Cal. Rptr. at 836.

729. *Id.* at 501-02, 198 Cal. Rptr. at 836 (citations omitted).

730. 589 F. Supp. 423 (N.D.N.Y. 1984).

731. *Id.* at 425.

732. *Id.* at 427 (citing Smith v. Superior Court, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984)) (noting that the "court there recognized a new tort" and distinguished the circumstances of the California case from the instant facts because of lack of agreement to preserve evidence) (other citations omitted).

733. 150 Ariz. 118, 722 P.2d 286 (1986).

734. *Id.* at 121, 722 P.2d at 289.

cide can and a piece of information that the plaintiff had given to her treating physician regarding the content of the pesticide used to spray her apartment.[735] The *LaRaia* court believed that it did not have to recognize a new tort because under general negligence principles the landlord had a duty to mitigate the plaintiff's poisoning damages attributable to the spraying of her apartment with the pesticide.[736]

Unlike the *LaRaia* court, the Alaska Supreme Court, in the 1986 decision *Hazen v. Municipality of Anchorage*,[737] found the *Smith* court's reasoning persuasive and held that the owner of a massage parlor had a cause of action against local government officials for alteration of the tape recording of an arrest.[738] The recording would have provided crucial evidence that the officials had committed the torts of false arrest and malicious prosecution in arresting the owner.[739]

The Kansas Supreme Court, in the 1987 case *Koplin v. Rosel Well Perforators, Inc.*,[740] declined to recognize an action for intentional spoliation of evidence.[741] The *Koplin* case was a personal injury suit that arose because a piece of equipment, manufactured by a third party, failed due to an alleged defect and injured the plaintiff. The plaintiff's employer destroyed the defective piece of equipment so that it could not be used in the plaintiff's third party products liability claim against the manufacturer.[742] The court refused to recognize the action because of concerns about endless litigation, inconsistency with the intent of the worker's compensation laws, the plaintiff's ability to have ever recovered in the underlying action, the nature of the damages, the limitless scope of the new duty which would be created, and the intrusion into the property rights of a person who lawfully disposes of his own property.[743]

(m) Public police and emergency expenditures recovery cases.—Spurred by the economic and policy analysis of the Ninth

735. *Id.* at 123, 722 P.2d at 291. The court, however, remanded the case to permit other amendments. *Id.*

736. *Id.* at 122, 722 P.2d at 290.

737. 718 P.2d 456 (Alaska 1986).

738. *Id.* at 463.

739. *Id.* at 464. The court noted that: "Hazen's prospective false arrest and malicious prosecution actions were available expectancies. If the arrest tape [proving these torts] was intentionally altered, this was an unreasonable interference with these expectancies." *Id.*

740. 241 Kan. 206, 734 P.2d 1177 (1987).

741. *Id.* at 215, 734 P.2d at 1177.

742. *Id.* at 207, 734 P.2d at 1178.

743. *Id.* at 215, 734 P.2d at 1183.

Circuit Court of Appeals in *City of Flagstaff v. Atchison, Topeka & Santa Fe*,[744] courts during the 1980s considered, but did not recognize, new tort liability for causing public police and emergency expenditures recovery.[745] In *Flagstaff*, the city sued a railroad for costs incurred in evacuating all people living near derailed tank cars carrying liquified petroleum gas. Writing for the court, Judge (now Justice) Kennedy concluded that Arizona law did not recognize the municipality's action and held that the legislature, not the courts, should authorize recovery for the city's action.[746] The *Flagstaff* court reasoned that the imposition of the new liability was not worth upsetting either the expectations of individuals and businesses or the already existing fair and sensible system for spreading the costs of an accident.[747] The *Flagstaff* court also said that for economic policy reasons, the party who can avoid risks most economically should bear the cost of paying for them.[748]

The United States Court of Appeals for the District of Columbia Circuit largely tracked the *Flagstaff* approach in *District of Columbia v. Air Florida, Inc.*[749] That case involved the District's suit against Air Florida to recover costs of emergency services and cleanup required in the aftermath of a plane crash into the 14th Street Memorial Bridge. Acknowledging that "settled expectations must sometimes be disregarded when new tort doctrines are needed to remedy an inequitable allocation of risks and costs,"[750] the court still found that judicial adjustment of liabilities was inappropriate in this case because a generally fair system for spreading the costs of accidents was already in effect.[751] Furthermore, the *Air Florida* court was reluctant to reallocate risks when the injured party is the government because the government's decision to provide tax-supported services is a legislative policy determination and not a decision for the courts to make.[752]

San Luis Obispo County v. Abalone Alliance[753] also followed the lead and rationale of the *Flagstaff* and *Air Florida* cases in dis-

744. 719 F.2d 322 (9th Cir. 1983).
745. *Id.* at 323.
746. *Id.*
747. *Id.*
748. *Id.* (citing Union Oil Co. v. Oppen, 501 F.2d 558, 569 (9th Cir. 1974), citing G. CALABRESI, THE COST OF ACCIDENTS 69-73 (1970); Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960)).
749. 750 F.2d 1077 (D.C. Cir. 1984).
750. *Id.* at 1080.
751. *Id.*
752. *Id.* (footnote omitted).
753. 178 Cal. App. 3d 848, 223 Cal. Rptr. 846 (1986).

missing a county's cause of action against various environmental groups seeking to recover police expenditures incurred in responding to a civil disobedience disturbance at the Diablo Canyon Nuclear Power Plant.[754] The court was reluctant to create a new tort doctrine in the face of "settled expectations."[755] Citing Prosser's tort treatise, the California Court of Appeal noted that the state cannot sue in tort in its political or governmental capacity whereas a property owner may sue in tort for injuries to his property in his capacity as an individual proprietor.[756]

(n) Breach of confidence cases.—During the 1980s, the Oregon appellate courts, utilizing "new tort" phraseology, explored the cause of action called "breach of confidential relationship" in *Humphers v. First Interstate Bank.*[757] The case involved a patient's suit against a physician's estate for revealing her name to her natural child, who had been adopted more than twenty years ago.[758] The court dismissed the plaintiff's counts for outrageous conduct, medical malpractice, and breach of contract, but upheld her claims for invasion of privacy and breach of confidential relationship.[759] The court noted that the plaintiff's claim for breach of confidential relationship was a case of first impression.[760] Concluding that two statutory provisions, one dealing with the physician-patient privilege, the other with physician licensing requirements, could not reasonably be interpreted to justify a civil remedy for violation of the physician-patient relationship, the court said that the issue was "whether a physician-patient duty of confidentiality exists in Oregon in spite of the absence of such a rule in common law and any statute creating such a right."[761] Referring to past Oregon case law, the *Humphers* court found support for its authority to recognize new rights of recovery in tort law[762] and observed that Oregon courts have not been hesitant about

754. *Id.* at 858-59, 223 Cal. Rptr. at 850-51.

755. *Id.* at 859, 223 Cal. Rptr. at 851 (quoting District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1080 (D.C. Cir. 1984)).

756. *Id.* (quoting W. PROSSER & W. KEETON, TORTS § 2 at 7 (5th ed. 1984).

757. 68 Or. App. 573, 684 P.2d 581 (1984), *aff'd in part, rev'd in part*, 298 Or. 706, 696 P.2d 527 (1985).

758. *Id.* at 576, 684 P.2d at 583-84.

759. *Id.* at 585, 684 P.2d at 589.

760. *Id.* at 578, 684 P.2d at 585.

761. *Id.* at 579, 684 P.2d at 585.

762. Humphers v. First Interstate Bank, 68 Or. App. 573, 579, 684 P.2d 581, 585 (1984), *aff'd in part, rev'd in part*, 298 Or. 706, 696 P.2d 527 (1985) (citing Norwest v. Presbyterian Intercommunity Hosp., 52 Or. App. 853, 855, 631 P.2d 1377, *aff'd*, 293 Or. 543, 652 P.2d 318 (1982)).

creating new torts.[763] In addition, the *Humphers* court found support for a civil right of recovery from the violation of confidentiality between a physician and patient in other jurisdictions.[764]

On appeal, the Oregon Supreme Court upheld the plaintiff's claim for breach of confidential relationship but not the claim for invasion of privacy.[765] The supreme court observed that the claims of breach of privacy and wrongful disclosure of confidential information seem similar but they depend on different premises.[766] Writing for the court, Justice Linde traced the physician's tort liability to the "non-consensual duty of confidentiality" emanating from a patient's statutory privilege to exclude a doctor's testimony in litigation coupled with statutory legal duties imposed on doctors.[767]

Jurisprudentially noteworthy in *Humphers* was the disagreement between the supreme court and intermediate appellate court about whether Oregon courts have hesitated to create new torts.[768] The supreme court observed "that at all times a court must decide a new point of law that necessarily will establish either a right in the plaintiff or a privilege or immunity in the defendant . . . [but] at least we *do hesitate* long enough to examine the premises for or against a 'new tort.' "[769]

(o) Negligent misrepresentation cases.—Several courts during the eighties employed "new tort" language to probe the consequences of recognizing a cause of action for negligent misrepresentation. A federal district court in *Robertson v. White*[770] declined to recognize the cause of action in a case brought by a class of co-op members against accountants and lawyers for negligence and fraud

763. *Id.* at 579, 684 P.2d at 586 (citing Pakos v. Clark, 253 Or. 113, 453 P.2d 682 (1969) (creating tort of intentional infliction of emotional distress by outrageous conduct); Hinish v. Meier & Frank Co., 166 Or. 482, 113 P.2d 438 (1941) (creating tort of invasion of privacy)).

764. *Id.* The dissent in *Humphers* believed that the court did not have to create a new tort called breach of confidential relationship given the availability of the existing tort remedy of invasion of privacy. *Id.* at 585, 684 P.2d at 589 (Warren, J., dissenting).

765. Humphers v. First Interstate Bank, 298 Or. 706, 721-22, 696 P.2d 527, 536 (1985).

766. *Id.* at 711, 696 P.2d at 529. "Their common denominator is that both assert a right to control information, but they differ in important respects. Not every secret concerns personal or private information; commercial secrets are not personal, and government secrets are neither personal nor private. Secrecy involves intentional concealment." *Id.*

767. *Id.* at 718, 696 P.2d at 534 (footnote omitted).

768. *Id.* at 717 n.14, 696 P.2d at 533 n.14.

769. *Id.* (citation omitted). During the course of its "new tort" analysis, the supreme court cited Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982).

770. 633 F. Supp. 954 (W.D. Ark. 1986).

in prolonging the co-op's existence after insolvency.[771] The court observed that the timing was wrong for it to be creating new torts because the legislature was concerned about the availability and cost of business insurance.[772]

Similarly, the federal district court in, *Haigh v. Matsushita Electric Corp. of America*[773] declined to "create a new tort" for negligent misrepresentation.[774] The *Haigh* court was particularly opposed to trial judges making new law and furthermore stated that "there is no excuse for a court arrogating to itself the authority to move the law along some purportedly wise or socially desirable path."[775]

In *Weisman v. Connors*[776] a defendant argued that the lower court had created a new tort of promissory negligence when it found that the defendant had a duty of care in relation to statements he honestly made during discussions with the plaintiff about an executive position with an automobile distributorship.[777] The Maryland Court of Appeals implicitly accepted the defendant's argument in holding that certain representations made by the defendant during precontractual negotiations with the plaintiff were not admissible because the representations could not form the basis of the pre-existing tort of negligent misrepresentation.[778]

(p) Unreasonable, improper, or abusive litigation cases.—Judicial opinions in a few cases decided during the eighties applied the words "new tort" to cases alleging damages for unreasonable, improper, or abusive litigation. In *Carden v. Getzoff*,[779] the California Court of Appeal considered a husband's action against his wife's financial expert in a marital dissolution proceeding. The husband, an anesthesiologist, contended that the "Medical Practice Valuation" prepared by the defendant-accountant was false and was the cause of his settlement dissolution action.[780] In appealing the trial court's dismissal of his complaint, the plaintiff argued that a trend had developed in California in which the courts recognized a claim for improperly conducted litigation analogous to the spoliation of evi-

771. *Id.* at 969.
772. *Id.* at 970.
773. 676 F. Supp. 1332 (E.D. Va. 1987).
774. *Id.* at 1350.
775. *Id.*
776. 312 Md. 428, 540 A.2d 783 (1988).
777. *Id.* at 441, 540 A.2d at 789.
778. *Id.* at 456, 540 A.2d at 793-98.
779. 190 Cal. App. 3d 907, 235 Cal. Rptr. 698 (1987).
780. *Id.* at 910, 235 Cal. Rptr. 699.

dence tort.[781] The *Getzoff* court concluded that the tort was not cognizable, noting that as long as a good faith basis for the suit exists, even malicious publications are protected as part of the policy of granting litigants access to the courts.[782]

A number of Georgia decisions discussed the contours of the Georgia Supreme Court's 1986 decision in *Yost v. Torok*,[783] which molded the torts of malicious use and malicious abuse of civil process into the new tort of abusive litigation. The tort of abusive litigation arises when a party asserts a claim not supported by a justiciable issue of law or fact.[784] Courts noted that the *Yost* decision recognized that malicious use of process and malicious abuse of process presented problems to litigants in that neither could proceed as a counterclaim unless the party who allegedly committed either tort won the underlying action.[785]

(q) Intentional interference with business or economic relations cases.—Judicial opinions in two cases reported during the eighties referred to "new tort" language in reviewing tort theories alleging intentional interference with business or economic relations. In a partial dissenting opinion in *Gross v. Lowden Realty Better Homes & Gardens*,[786] the Chief Justice of the Alabama Supreme Court objected to the majority's adoption of the *Restatement (Second) of Torts* "expansive new tort" for intentional interference with a contract or business relation.[787] The dissent noted that previously the complaining party had to prove fraud or coercion[788] and argued that the "new tort" is too vague because it makes the defendant prove justification.[789]

(r) Miscellaneous cases.—In addition to the generic categories

781. *Id.* at 911, 235 Cal. Rptr. 700.

782. *Id.* at 915, 235 Cal. Rptr. 703 (citation omitted). *Cf.* Battig v. Forshey, 7 Ohio App. 3d 72, 454 N.E.2d 168, 171 (1982) (intermediate appellate court was "without authority to overrule controlling Ohio Supreme Court precedent to create the 'new tort' [of 'unreasonable or improper litigation']").

783. 256 Ga. 92, 344 S.E.2d 414 (1986).

784. Augusta Tennis Club v. Leger, 186 Ga. App. 440, 442, 367 S.E.2d 263, 264 (1988). *See also* A.L. Williams Corp. v. Faircloth, 120 F.R.D. 135, 137 (N.D. Ga. 1987); Wilson v. Cotton States Mut. Ins. Co., 183 Ga. App. 353, 356, 358 S.E.2d 874, 876 (1987).

785. Analytical Systems Inc. v. ITT Commercial Fin. Corp., 696 F. Supp. 1469, 1476-77 (N.D. Ga. 1986).

786. 494 So. 2d 590 (Ala. 1986).

787. *Id.* at 598 (Torbert, C.J., concurring in part, dissenting in part; dissenting as to this part) (citing RESTATEMENT (SECOND) OF TORTS §§ 766-774A (1979)).

788. *Id.*

789. *Id.* at 599-600 (footnote omitted).

of cases previously discussed,[790] jurists utilized "new tort" terminology to debate an assortment of additional tort theories during the 1980s. For example, courts decided that suicide did not constitute an actionable "new tort;"[791] that public policy bars an action for "educational malpractice;"[792] that a claim for negligent publication of an advertisement in the classified section of a telephone directory is not actionable;[793] and that the first amendment and state constitutional provisions protected the Jehovah's Witnesses practice of "shunning," barring it from "new tort" status.[794] A claim for negligent failure to investigate the safety of an advertised product was held not actionable.[795] A private right of action for bribery of public officials under state statutory or common law was denied.[796] One court would not "legislate new tort law" to hold a social host liable for serving alcohol to an intoxicated person[797] and another court would not "create a new tort" of sexual extortion.[798]

IV. A Tentative Appraisal of "New Tort" Suppositions: Problems and Prospects

Over the last one hundred years, beginning with the framework established in Warren and Brandeis's *Right of Privacy* article in 1890, courts and commentators have utilized "new tort" phraseology to plumb the depths of judicial creativity in the realm of modern tort law. This article has, thus far, traced the history of the use of the "new tort" concept in American law and has provided a taxonomical structure that has identified two broad categories of cases employing the term: (1) statutory and constitutional construction cases and (2) novel questions of common law causes of action. Analysis of these

790. *See supra* notes 434-789 and accompanying text.

791. *See* Wilmington Trust Co. v. Clark, 289 Md. 313, 424 A.2d 744 (1981).

792. *See* Hunter v. Bd. of Montgomery County, 47 Md. App. 709, 715, 425 A.2d 681, 684 (1981) ("It is conceivable that, if allowed, suits for educational malpractice might arise every time a child failed a grade, subject, or test, with the result that teachers could possibly spend more time in lawyers' offices and courtrooms than in the classroom.").

793. *See* Morgan Roofing, Inc. v. Ohio Bell Tel., 21 Ohio App. 3d 53, 486 N.E.2d 191 (1984).

794. Paul v. Watchtower Bible & Tract Soc. of New York, 819 F.2d 875, 878 (9th Cir. 1987).

795. Walters v. Seventeen Magazine, 195 Cal. App. 3d 1119, 241 Cal. Rptr. 101 (1987) (tampons).

796. H.J. Inc. v. Northwestern Bell Corp., 420 N.W.2d 673, 676 (Minn. Ct. App. 1988).

797. Burkhart v. Harrod, 110 Wash. 2d 381, 389, 755 P.2d 759, 763 (1988) (citing and refusing to follow, *inter alia*, Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1 (1983); Peck, *The Role of the Court and Legislature in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963)).

798. Bouchet v. National Urban League, Inc., 730 F.2d 799, 807 (D.C. Cir. 1984).

categories has revealed the numerous distinct "new tort" causes of action that have emerged and ripened during this century and the proliferation of these discrete actions in recent years.

But other taxonomical observations are necessary. The various factors that courts and commentators have used in attempting to link the universe of possible tort means and ends while utilizing the term "new tort" should be examined and synthesized. Moreover, the various general meanings that courts and commentators have expressly or implicitly attributed to the phrase "new tort" should be classified.

A. Factors Considered: A Multiplicity of Concerns

As demonstrated in prior discussion, judges and scholars have articulated a wide assortment of decisional and interpretational factors in the process of writing about the desirability of recognizing, expanding, or limiting a "new tort." Postponing for the time a discussion of what these jurists and writers may have meant by employing the phrase "new tort," at this juncture a list of the factors considered seems most useful. The factors considered by judges and scholars include:

> (1) Statutory construction or analogy: for example, whether express statutory/constitutional language supports recognizing, expanding, or limiting a "new tort"; whether a new tort can be implied from a statute's/constitution's language and history; whether a statutory/constitutional provision provides an analogy for judicial creation of a "new tort;"
>
> (2) Persuasive authority from other jurisdictions;
>
> (3) Whether current statutory or common law provides an existing remedy for a clear wrong;
>
> (4) Reliance and expectancy interests of the parties at bar or similarly situated parties;
>
> (5) Consistency of existing principles of tort law with the proposed "new tort;"
>
> (6) The relative importance of the interest or interests at stake;
>
> (7) Whether the proposed "new tort" is suggested by analogy to traditional common law principles;
>
> (8) The logic and reasonableness of recognizing the "new tort;"
>
> (9) Whether current tort law has yielded nonuniform, inconsistent or unjust results;
>
> (10) Concerns bearing on judicial restraint, such as: federalism; whether the legislature is better equipped to decide a matter of public policy; separation of powers; whether recogni-

tion of a "new tort" would contravene longstanding law; whether a higher court should make a judicial policy decision; stare decisis; hesitancy to expand a "new tort" too quickly; the desirability of deferring to a pre-existing, principled statutory scheme;

(11) The force of scholarly opinion;

(12) Concern about fostering multiple or frivolous litigation;

(13) Freedom of contract considerations;

(14) Considerations of deterrence and punishment;

(15) Concern about allowing excessive damages or windfall damages;

(16) Whether a wrongful injury will go uncompensated;

(17) Considerations regarding the nature of tort law: for example, whether tort law is a dynamic and flexible system of law or a pre-existing set of categories and rules;

(18) Matters of pragmatism and practicality;

(19) Matters of morality, social values, and custom;

(20) Labelling considerations: for example, whether a proposed "new tort" can be reduced to a name;

(21) Technological impact: for example, the need to respond legally to changing modern enterprise and inventions that have created new, unforeseen avenues for personal injury;

(22) Macro-economic considerations: for example, the likely impact of a "new tort" on industrial growth, efficiency, and productivity; micro-economic considerations such as the probable impact of a "new tort" rule on insurance markets;

(23) Historical matters: for example, whether the current state of the law is archaic, outmoded, and in need of reform;

(24) The procedural context of the case: for example, whether the ruling below is an order for a directed verdict, a summary judgment, or an order notwithstanding a jury verdict;

(25) The nature of the facts of the case, and;

(26) The motive of the plaintiff or defendant in proposing a "new tort" theory.

B. Factors Applied: An Absence of Consistency and Priorities

Of these twenty-six categories of decisional and interpretational factors identified in the extant "new tort" cases, judges have typically focused on only a few of the considerations in a particular case. Different courts stress different factors. Indeed, a particular judge in different cases may utilize varying factors without explaining why a change in analysis is in order.

Neither "new tort" case law nor scholarship to date has at-

tempted to comprehensively assess the most important decisional and interpretational factors of analysis, or how the factors should relate to each other. Although many judges and scholars have asserted the importance of various considerations, such as the desirability of deferring to the legislature or the need to expand tort principles in light of technological change, no jurist or scholar employing the term "new tort" in the course of analysis has attempted to comprehensively analyze the interrelationship of the numerous factors or to explain whether some factors deserve priority in certain kinds of tort cases.[799] This is a worthy project for future work.

Three recent books offer a foundation for further theory building in understanding what decisional and interpretational factors the courts should use in entertaining "new tort" arguments, and how they should use these factors. Oxford law professor John Bell, in his book *Policy Arguments in Judicial Decisions*,[800] analyzes the proper role of the English judiciary in light of three role models that he terms the *consensus model* (judges should make value judgments according to social consensus), the *rights model* (judges should be limited to questions of rights and should not decide issues about collective welfare), and the *interstitial legislator model* (within proper limits, judges should make decisions of a similar character as legislators). In the process of reviewing English case law in which judges have openly discussed the policy bases of their decisions, Bell identifies six generic judicial policy arguments based on: (1) social factors; (2) administrative factors; (3) constitutional limitations; (4) fairness; (5) economic analysis; and (6) "absent" factors (these may involve "various elements which are not present in the rule-created decisions in courts").[801]

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799. *Compare* the robust literature on the role of the judiciary vis-a-vis the legislature in creating new tort law (R. KEETON, VENTURING TO DO JUSTICE (1969); Cooperrider, *A Comment on the Law of Torts*, 56 MICH. L. REV. 1290 (1958); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962); Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1 (1983); Peck, *Judicial Creativity and Tort Law*, 21 TRIAL 19 (1985); Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229 (1981); Sommer, *Transformative Torts*, 97 YALE L.J. 645 (1988)) *with* general jurisprudential writings on appellate judging (Albertsworth, *Imitative and Apocryphal Reasoning of Courts*, 8 CORNELL L.Q. 229 (1923); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); Cardozo, *Law and Literature*, 14 YALE L.J. 705 (1925); Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961); Frankfurter, *Judge Learned Hand*, 60 HARV. L. REV. 325 (1947); Hutcheson, *The Judgment Intuitive: The Function of the Hunch in Judicial Decision*," 14 CORNELL L.Q. (1929); Hopkins, *Public Policy in the Formulation of a Rule of Law*, 37 BROOKLYN L. REV. 323 (1971); K. LLEWELLYN, THE COMMON LAW TRADITION — DECIDING APPEALS (1960); Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940 (1923)).

800. J. BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS (1983).

801. *Id.* at 77.

In a more comprehensive generic study, Louisiana State University law professor Julio Cueto-Rua addresses the "dialectical process of evaluating and understanding the law as evidenced by the judges' grounding their decisions in similar . . . considerations."[802] According to the analytical framework in Professor Cueto-Rua's book, *Judicial Methods of Interpretation of the Law*, judges should decide hard cases by considering five groups of elements in the dialectic process of interaction between the facts of the case and conceivable rules of law that may be applied to the case.[803] The five elements are: (1) logical elements; (2) historical elements; (3) pragmatic and teleological elements; (4) doctrinal elements; and (5) value-laden axiological elements.[804]

Finally, Harvard law professor Henry Steiner, in his 1987 book *Moral Argument and Social Vision in the Courts: A Study of Tort Accident Law*,[805] explores an ideal decisional technique for appellate courts to use in response to modern tort arguments. Drawing on themes derived from legal realism, moral theory, as well as insights of critical legal studies, Steiner sketches an interdependent framework for understanding tort legal argument, which consists of three vital elements: (1) existing doctrine (rules); (2) courts' moral arguments or justifications supporting these rules; and (3) the social vision of courts in forming such justifications and, therefore, legal doctrine.[806]

C. *The Elusive Meaning of "New Tort"*

What is a "new tort"? Beyond an overriding classification of new tort problems into matters of statutory and constitutional interpretation and beyond review of novel questions of common law causes of action, what have courts and commentators meant by the term "new tort"? A few generalizations are in order.

First, most courts and commentators have used the phrase as a term of art to express a recent or contemplated departure from preexisting law. Indeed, this reference is consistent with the dictionary definition of "new:" "of recent origin; having existed only a short time; lately made, produced, or grown . . .; [n]ot yet old; fresh; re-

802. J. CUETO-RUA, JUDICIAL METHODS OF INTERPRETATION OF THE LAW 3 (1981).
803. *See generally id.*
804. *Id.*
805. H. STEINER, MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS: A STUDY OF TORT ACCIDENT LAW (1987).
806. *See generally id.*

cent; [u]sed for the first time; not second hand."[807] In this regard, however, some courts have persisted in calling relatively well-established tort actions, such as intentional infliction of emotional distress or invasion of privacy, "new" torts. Although these causes of action may have been "new" several decades ago, referring to them as "new" after a significant passage of time or adoption of a theory by several jurisdictions seems anomalous. Yet, courts and commentators still tend to use the phrase "new tort" either out of habit or out of reference to seminal law review articles or decisions characterizing the tort as "new."

Second, most courts and commentators have used the phrase "new tort" in a cautionary sense; they use it as an expression of judicial concern that they are addressing a doctrinal issue of first impression or one that will have far-reaching future policy consequences. This cautious attitude has interfered, at times, with comprehensive and insightful resolution of a novel case.

Third, and related to the second generalization, a few judges have used the words "new tort" in a pejorative sense. Judges use the phrase perjoratively particularly when writing to justify an unwillingness to change existing tort doctrine or to protest the majority's extension of traditional tort law. These judges seem to suggest that to alter existing tort rules would be bad or extremely unwise.

Fourth, a handful of judges and commentators have utilized "new tort" phraseology to trumpet judicial power to change traditional tort doctrine and to express pride in undertaking that change. For these few judges and scholars, a "new tort" is a concept of beauty, of progress, and of enlightenment.

V. Conclusion

Judicial and scholarly use of the words "new tort" aptly fits Justice Holmes' observation that "word[s] [are] not . . . crystal[s], transparent and unchanged; [they are] the skin[s] of . . . living thought[s] and may vary greatly in color and content according to the circumstances and the time in which [they are] used."[808] At its essence, however, the term "new tort," as used by American courts and commentators over the past one hundred years, is an indication, an item of circumstantial evidence, that a court is being requested to or has decided to use judicial creativity to alter existing tort law.

807. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 883 (1969).
808. Towne v. Eisner, 245 U.S. 418, 425 (1917).

Such use of the phrase is an indication that legal change is at issue and is worth learning more about.